

B.P.D.C.

Background
Material re

Pornography Law
Reform

for Charles Campbell

CONFIDENTIAL
UNTIL TABLED IN PARLIAMENT
C-

Second Session, Thirty-third Parliament,
35-36 Elizabeth II, 1986-87

THE HOUSE OF COMMONS OF CANADA

BILL C-54

An Act to amend the Criminal Code and other Acts in
consequence thereof

First reading, , 1987

CONFIDENTIEL
JUSQU'À DÉPÔT AU PARLEMENT
C-

Deuxième session, trente-troisième législature,
35-36 Elizabeth II, 1986-87

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-

Loi modifiant le Code criminel et d'autres lois en
conséquence

Première lecture le 1987

THE MINISTER OF JUSTICE

LE MINISTRE DE LA JUSTICE

THE HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C- 54

PROJET DE LOI C-

An Act to amend the Criminal Code and
other Acts in consequence thereof

Loi modifiant le Code criminel et d'autres
lois en conséquence

Her Majesty, by and with the advice and
consent of the Senate and House of Com-
mons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consente-
ment du Sénat et de la Chambre des commu-
nes du Canada, édicte :

R.S., c. C-34;
cc. 11, 44 (1st
Suppl.); c. 2
(2nd Suppl.);
1972, cc. 13,
17; 1973-74, cc.
17, 38, 50;
1974-75-76, cc.
19, 48, 66, 86,
93, 105, 108;
1976-77, cc. 35,
53; 1977-78, c.
36; 1978-79, c.
10; 1980-81-82-
83, cc. 43, 47,
54, 99, 110,
125, 161; 1984,
cc. 21, 40, 41;
1985, cc. 19,
26, 44, 50, 52;
1986, c. 35

CRIMINAL CODE

CODE CRIMINEL

S.R., ch. C-34;
ch. 11, 44 (1^{re}
suppl.); ch. 2
(2^e suppl.);
1972, ch. 13,
17; 1973-74, ch.
17, 38, 50;
1974-75-76, ch.
19, 48, 66, 86,
93, 105, 108;
1976-77, ch. 35,
53; 1977-78, ch.
36; 1978-79, ch.
10; 1980-81-
82-83, ch. 43,
47, 54, 99, 110,
125, 161; 1984,
ch. 21, 40, 41;
1985, ch. 19,
26, 44, 50, 52;
1986, ch. 35

1. Section 138 of the *Criminal Code* is
amended by adding thereto, in alphabetical
order within the section, the following
definitions:

"erotica"
«document
érotique»

"erotica" means any visual matter a
dominant characteristic of which is the
depiction, in a sexual context or for the
purpose of the sexual stimulation of the
viewer, of a human sexual organ, a
female breast or the human anal region;

"pornography"
«pornographie»

"pornography" means

1. L'article 138 du *Code criminel* est
modifié par insertion, suivant l'ordre alpha- 5
bétique, de ce qui suit :

«document érotique» Tout matériel visuel
dont une caractéristique principale est la
représentation, dans un contexte sexuel
ou en vue de la stimulation sexuelle du 10
spectateur, d'organes sexuels humains,
des seins de la femme ou de la région
anale de l'homme ou de la femme.

«pornographie»

«document
érotique»
"erotica"

«pornographic»
"pornography"

- (a) any visual matter that shows
 (i) sexual conduct that is referred to in any of subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be, under the age of eighteen years, or the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years,
 (ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,
 (iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context,
 (iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,
 (v) bestiality, incest or necrophilia, or
 (vi) masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse, or
 (b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v);"

a) Tout matériel visuel qui représente les conduites, scènes ou actes suivants :

- (i) conduite sexuelle visée à l'un des sous-alinéas (ii) à (vi) et qui met en cause une personne âgée, réellement ou en apparence, de moins de dix-huit ans — ou présentée comme telle — ou qui se déroule devant une telle personne ainsi que l'exhibition, dans un but sexuel, d'organes sexuels, des seins ou de la région anale d'une personne âgée, réellement ou en apparence de moins de dix-huit ans — ou présentée comme telle — ou l'exhibition, dans un but sexuel, d'organes sexuels humains, des seins de la femme ou de la région anale de l'homme ou de la femme devant une telle personne,
 (ii) scènes où une personne, dans un contexte sexuel, cause, tente de causer ou semble causer à soi ou à autrui des lésions permanentes ou étendues du corps ou d'une fonction corporelle,
 (iii) conduite sexuelle violente, notamment toute forme d'agression sexuelle et toute conduite caractérisée par des douleurs physiques infligées, réellement ou en apparence, sur soi ou sur autrui, dans un contexte sexuel,
 (iv) scènes dégradantes, dans un contexte sexuel, y compris des scènes où une personne en traite une autre ou elle-même comme un animal ou un objet, des scènes où une autre personne est attachée, des scènes de défécation, de miction ou d'éjaculation sur une autre personne — que l'autre personne semble consentir aux actes en question ou non — des scènes montrant la pénétration du vagin ou de l'anus par un objet, que la personne qui subit cet acte semble y consentir ou non, ou, dans un contexte sexuel, des scènes de lactation ou de menstruation,

1974-75-76, c.
48, s. 25; 1984,
c. 41, s. 2

2. Sections 159 to 165 of the said Act are repealed and the following substituted therefor:

Dealing in
pornography

"159. (1) Every person who deals in pornography is guilty of an offence.

Definition of
"deals"

(2) For the purposes of this section, a person deals in pornography if the person imports, makes, prints, publishes, broadcasts, distributes, possesses for the purpose of distribution, sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, the pornography.

Punishment

(3) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Idem

(4) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in any of subparagraphs (a)(iii) to (v) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in any of those subparagraphs, is guilty

- (v) bestialité, inceste ou nécrophilie,
- (vi) masturbation ou éjaculation, sauf l'éjaculation visée au sous-alinéa (iv), ou relations sexuelles vaginales, anales ou orales;
- b) objet ou communication commerciale qui encourage, favorise ou approuve les conduites, scènes ou actes visés aux sous-alinéas a)(i) à (v).

2. Les articles 159 à 165 de la même loi sont abrogés et remplacés par ce qui suit :

1974-75-76, ch.
48, art. 25;
1984, ch. 41,
art. 2

«159. (1) Les pornographes sont coupables d'une infraction.

(2) Pour l'application du présent article, est considérée comme pornographe toute personne qui importe, fabrique, imprime, publie, diffuse à la radio ou à la télévision, distribue ou a en sa possession dans l'intention de la distribuer, vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de la vendre ou de la louer ou expose à la vue de personnes qui se trouvent dans un endroit public de la pornographie.

(3) Quiconque commet l'infraction prévue au paragraphe (1) à l'égard des conduites, scènes ou actes mentionnés aux sous-alinéas a)(i) ou (ii) de la définition de «pornographie» à l'article 138 ou des objets ou communications mentionnés à l'alinéa b) de cette définition — si ces objets ou communications visent des conduites, scènes ou actes mentionnés à l'un de ces sous-alinéas — est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans.

(4) Quiconque commet l'infraction prévue au paragraphe (1) à l'égard des conduites, scènes ou actes mentionnés aux sous-alinéas a)(iii) à (v) de la définition de «pornographie» à l'article 138 ou des objets ou communications mentionnés à l'alinéa b) de cette définition — si ces objets ou communications visent des conduites, scènes ou actes mentionnés à l'un de ces sous-alinéas — est coupable :

Pornographie

Définition

Peine

Idem

kids
bodily
impairment

violence
p/m
bestiality

Idem

everything
else

Defences

artistic
merit

Not if

kids.

deprave
impairmentDeclaration of
courtChildren in
pornography

(a) of an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) of an offence punishable on summary conviction.

(5) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(vi) of the definition "pornography" in section 138 is guilty

(a) of an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) of an offence punishable on summary conviction.

159.1 (1) Where an accused is charged with an offence under section 159, other than an offence that is in relation to conduct referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the matter or communication in question has artistic merit or an educational, scientific or medical purpose.

(2) Where a court finds an accused not guilty by reason of the defence of artistic merit set out in subsection (1), the court shall declare that the matter or communication that formed the subject-matter of the alleged offence is not pornography.

159.2 (1) Every person who

(a) uses, induces, incites, coerces or agrees to use a person who is under the age of eighteen years to participate in the production of any matter referred to in subparagraph (a)(i) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition and that

a) soit d'un acte criminel et est passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable par procédure sommaire.

(5) Quiconque commet l'infraction prévue au paragraphe (1) à l'égard des conduites, scènes ou actes mentionnés au sous-alinéa a)(vi) de la définition de «pornographie» à l'article 138 est coupable :

a) soit d'un acte criminel et est passible d'un emprisonnement maximal de deux ans;

b) soit d'une infraction punissable par procédure sommaire.

159.1 (1) Lorsqu'une personne est accusée d'une infraction prévue à l'article 159, à l'exception d'une infraction qui porte sur des conduites, scènes ou actes mentionnés aux sous-alinéas a)(i) ou (ii) de la définition de «pornographie» à l'article 138 ou sur des objets ou des communications mentionnés à l'alinéa b) de cette définition — si ces objets ou communications visent des conduites, scènes ou actes mentionnés à l'un de ces sous-alinéas —, le tribunal est tenu de la déclarer non coupable si elle établit, selon la prépondérance des probabilités, que le matériel visuel, l'objet ou la communication en question a une valeur artistique ou un but éducatif, scientifique ou médical.

(2) Le tribunal qui accepte le moyen de défense de valeur artistique visé au paragraphe (1) et qui, en conséquence, acquitte l'accusé est tenu de déclarer que le matériel visuel, l'objet ou la communication à l'origine de l'accusation n'est pas pornographique.

159.2 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

a) incite, engage ou force une personne âgée de moins de dix-huit ans à participer à la production de matériel visuel qui représente des conduites, scènes ou actes mentionnés au sous-alinéa a)(i) de la définition de «pornographie» à l'arti-

Idem

Moyens de
défenseDéclaration du
tribunalPornographie
mettant en
cause des
enfants

involves a person referred to in subparagraph (a)(i) of that definition, or

(b) depicts a person as being under the age of eighteen years in such matter or communication

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Possession

possession
ve:
kids

(2) Every person who, knowingly, without lawful justification or excuse, possesses any matter referred to in subparagraph (a)(i) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition and that involves a person referred to in subparagraph (a)(i) of that definition is guilty of an offence punishable on summary conviction.

Defence —
child pornography

159.3 Where an accused is charged with

(a) an offence under section 159.2, or

(b) an offence under section 159 with respect to any matter referred to in subparagraph (a)(i) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition and that involves a person referred to in subparagraph (a)(i) of that definition,

the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the accused took all reasonable steps to ensure that no person in the matter or communication was, was depicted as being, appeared to be or was described as being under the age of eighteen years.

onus to
establish
under
18.

Exhibition of
erotica to
person under 18

159.4 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented any erotica in the presence of a person under the age of eighteen years is guilty of an offence punishable on summary conviction.

Sale or rental of
erotica to
person under 18

159.5 Every person who sells, rents or offers to sell or rent to a person under the age of eighteen years any erotica is guilty

cle 138 ou à la production d'objets ou de communications mentionnés à l'alinéa b) de cette définition et mettant en cause des personnes mentionnées dans ce sous-alinéa ou accepte d'employer une telle personne à ces fins;

b) présente une personne comme étant âgée de moins de dix-huit ans dans un tel matériel, objet ou communication.

(2) Est coupable d'une infraction punissable par procédure sommaire quiconque sciemment, sans justification ni excuse légitime, a en sa possession du matériel visuel qui représente des conduites, scènes ou actes mentionnés au sous-alinéa a)(i) de la définition de «pornographie» à l'article 138 ou des objets ou communications mentionnés à l'alinéa b) de cette définition et mettant en cause des personnes mentionnées dans ce sous-alinéa.

Possession

Moyens de
défense

159.3 Lorsqu'une personne est accusée d'une infraction prévue à l'article 159.2 ou d'une infraction prévue à l'article 159 qui porte sur du matériel visuel qui représente des conduites, scènes ou actes mentionnés au sous-alinéa a)(i) de la définition de «pornographie» à l'article 138 ou sur des objets ou communications mentionnés à l'alinéa b) de cette définition et qui mettent en cause des personnes mentionnées dans ce sous-alinéa, le tribunal est tenu de la déclarer non coupable si elle établit, selon la prépondérance des probabilités, qu'elle a pris toutes les mesures raisonnables pour s'assurer que le matériel visuel, les objets ou les communications en question ne montraient aucune personne âgée, réellement ou en apparence, de moins de dix-huit ans ou présentée comme telle.

159.4 Est coupable d'une infraction punissable par procédure sommaire le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soient présentés des documents érotiques en présence de personnes âgées de moins de dix-huit ans.

Présentation de
documents
érotiques aux
moins de 18 ans

159.5 Est coupable d'une infraction punissable par procédure sommaire quiconque vend, loue ou offre de vendre ou de

Vente ou
location de
documents
érotiques aux
moins de 18 ans

Defences

of an offence punishable on summary conviction.

159.6 Where an accused is charged with an offence under section 159.4 or 159.5, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that

(a) the accused took all reasonable steps to ensure that there was no erotica in the thing sold, rented, offered for sale or rental, presented or allowed to be presented or to ensure that the age of the person to whom the thing was sold, rented, offered for sale or rental, presented or allowed to be presented was eighteen years of age or more;

(b) the erotica has artistic merit or an educational purpose and was sold, rented, offered for sale or rental, presented or allowed to be presented for that purpose; or

(c) according to the classification system made by or under a law in force in the province in which the erotica was sold, rented, offered for sale or rental, presented or allowed to be presented, it had been classified or rated as acceptable for viewing by persons under the age of eighteen years.

Display of erotica

159.7 Every person who displays any erotica in a way that is visible to a member of the public in a public place, unless the public must, in order to see the erotica, pass a prominent warning notice advising of the nature of the display therein or unless the erotica is hidden by a barrier or is covered by an opaque wrapper, is guilty of an offence punishable on summary conviction.

Defences

159.8 Where an accused is charged with an offence under section 159.7, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that

louer des documents érotiques à une personne âgée de moins de dix-huit ans.

159.6 Lorsqu'une personne est accusée d'une infraction prévue aux articles 159.4 ou 159.5, le tribunal est tenu de la déclarer non coupable si elle établit, selon la prépondérance des probabilités, que, selon le cas :

Moyens de défense

a) elle a pris toutes les mesures raisonnables pour s'assurer que les objets qu'elle a vendus, loués, offerts en vente ou en location, ou présentés, ou dont elle a permis la présentation, ne contenaient aucun document érotique ou pour s'assurer que les personnes à qui elle les a vendus, loués, offerts en vente ou en location ou présentés ou devant qui elle a permis qu'ils soient présentés étaient âgées d'au moins dix-huit ans;

b) les documents érotiques ont une valeur artistique ou un but éducatif et ont été vendus, loués, offerts en vente ou en location ou présentés, ou leur présentation a été permise, dans ce but;

c) les documents érotiques appartiennent, selon le système de classification établi sous le régime d'une règle de droit en vigueur dans la province où ils ont été vendus, loués, offerts en vente ou en location ou présentés, ou dans laquelle leur présentation a été permise, à la catégorie de ceux qui peuvent être présentés aux personnes âgées de moins de dix-huit ans.

159.7 Est coupable d'une infraction punissable par procédure sommaire qui-conque expose à la vue de personnes qui se trouvent dans un endroit public des documents érotiques, sauf si, pour voir les documents, le public doit passer devant une mise en garde, placée en évidence, quant à leur nature, s'ils sont cachés par un panneau ou autre objet ou s'ils sont sous emballage opaque.

Exposition de documents érotiques

159.8 Lorsqu'une personne est accusée d'une infraction prévue à l'article 159.7, le tribunal est tenu de la déclarer non coupable si elle établit, selon la prépondérance des probabilités, que, selon le cas :

Moyens de défense

	<p>(a) the accused took all reasonable steps to ensure that there was no erotica in the thing displayed; or</p> <p>(b) the erotica has artistic merit or an educational, scientific or medical purpose.</p>	<p>a) elle a pris toutes les mesures raisonnables pour s'assurer que les objets exposés ne contenaient aucun document érotique;</p> <p>b) les documents érotiques ont une valeur artistique ou un but éducatif, scientifique ou médical.</p>	
Warrant of seizure	<p>160. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any thing kept for sale, rental, display or distribution in premises within the jurisdiction of the court is pornography shall issue a warrant authorizing the seizure of the thing.</p>	<p>160. (1) Le juge qui, par une dénonciation sous serment, est convaincu qu'il existe des motifs raisonnables de croire que des objets destinés à la vente, à la location, à l'exposition ou à la distribution et se trouvant dans un lieu du ressort du tribunal constituent de la pornographie délivre un mandat en autorisant la saisie.</p>	Mandat de saisie
Summons to occupier	<p>(2) Within seven days after the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring that occupier to appear before the court and show cause why the thing seized should not be forfeited to Her Majesty.</p>	<p>(2) Dans les sept jours suivant la délivrance du mandat, le juge ordonne à l'occupant du lieu de comparaître devant le tribunal et de présenter ses arguments contre l'éventuelle confiscation au profit de Sa Majesté des objets saisis.</p>	Somation à l'occupant
Owner and maker may appear	<p>(3) The owner and the maker of the thing seized may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of that thing.</p>	<p>(3) Le propriétaire et le réalisateur des objets saisis peuvent comparaître et être représentés dans les procédures pour s'opposer à l'ordonnance de confiscation.</p>	Comparution
Order of forfeiture	<p>(4) Where the prosecution satisfies the court beyond a reasonable doubt that the thing seized is pornography, the court shall make an order declaring the thing forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.</p>	<p>(4) Si le poursuivant le convainc hors de tout doute raisonnable que les objets saisis constituent de la pornographie, le tribunal en ordonne la confiscation au profit de Sa Majesté du chef de la province où les procédures ont lieu, pour qu'il en soit disposé selon les instructions du procureur général.</p>	Ordonnance de confiscation
Return of thing seized	<p>(5) Where the court is not satisfied that the thing seized is pornography, the court shall order that the thing be restored to the person from whom it was seized as soon as the time for final appeal has expired.</p>	<p>(5) S'il n'est pas convaincu qu'il s'agit de pornographie, le tribunal ordonne que les objets soient restitués au saisi dès l'expiration du délai d'appel en dernier ressort.</p>	Restitution au saisi
Appeal	<p>(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law under Part XVIII and that Part applies, with such modifications as the circum-</p>	<p>(6) Il peut être interjeté appel d'une ordonnance rendue en vertu des paragraphes (4) ou (5) par toute personne qui a comparu au cours des procédures comme s'il s'agissait d'un appel contre une déclaration de culpabilité ou contre un jugement ou verdict d'acquiescement, selon le cas, sur une question de droit, en vertu de</p>	Appel

stances require, to an appeal pursuant to this subsection.

Consent

(7) Where an order has been made under this section by a judge in a province with respect to any thing, no proceedings shall be instituted or continued in that province under section 159 with respect to that thing or any copy of that thing without the consent of the Attorney General.

Definitions

"court"
"tribunal"

(8) In this section,
"court" means

(a) in the Province of Quebec, the provincial court, the court of sessions of the peace, the municipal court of Montreal and the municipal court of Quebec,

(b) in the Provinces of New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of Queen's Bench,

(c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court, or

(d) in any other province, a county or district court;

"judge"
"juge"

"judge" means a judge of a court.

Child sale

161. Every person who refuses to sell or supply to any other person any thing for the reason only that the other person refuses to purchase or acquire from him any other thing that the other person is apprehensive might be pornography is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years.

Theatrical Performances

162. (1) Every person who

(a) uses, induces, incites, coerces or agrees to use a person who is under the age of eighteen years to participate in a performance that involves any conduct referred to in the definition "pornography" in section 138, or

Exploitation of children

la partie XVIII; cette partie s'applique, compte tenu des adaptations de circonstance, à un appel interjeté en vertu du présent paragraphe.

Consentement

(7) Lorsque le juge a, dans une province, rendu à l'égard de certains objets une ordonnance fondée sur le présent article, des procédures ne peuvent être intentées ou poursuivies dans cette province en vertu de l'article 159 à l'égard de ces objets, ou de leurs reproductions, sans le consentement du procureur général.

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

«tribunal»

15 «tribunal»
"court"

a) Au Québec, la Cour provinciale, la Cour des sessions de la paix, la Cour municipale de Montréal ou la Cour municipale de Québec;

b) au Nouveau-Brunswick, au Manitoba, en Alberta et en Saskatchewan, la Cour du Banc de la Reine;

c) dans l'Île-du-Prince-Édouard et à Terre-Neuve, la division de première instance de la Cour suprême;

d) dans les autres provinces, une cour de comté ou de district.

«juge» Juge d'un tribunal.

«juge»
"judge"

161. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque refuse de vendre ou de fournir à une personne un objet pour la seule raison qu'elle refuse de lui acheter ou d'acquiescer auprès de lui un autre objet susceptible, selon elle, de constituer de la pornographie.

Vente liée

Spectacles

162. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

Exploitation des enfants

a) incite, engage ou force une personne âgée de moins de dix-huit ans à participer à un spectacle montrant des conduites, scènes ou actes mentionnés à la définition de «pornographie» à l'article 138;

45

	(b) depicts a person as being under the age of eighteen years in such a performance	b) présente une personne comme étant âgée de moins de dix-huit ans dans un tel spectacle.	
Defence	is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years. (2) Where an accused is charged with an offence under this section, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the accused took all reasonable steps to ensure that no person who was or appeared to be under the age of eighteen years participated in the performance.	(2) Le tribunal est tenu de déclarer non coupable la personne accusée d'une infraction prévue au présent article si celle-ci établit, selon la prépondérance des probabilités, qu'elle a pris toutes les mesures raisonnables pour s'assurer qu'aucune personne âgée — réellement ou en apparence — de moins de dix-huit ans ne participait au spectacle.	Moyens de défense
Children in pornographic performances	163. Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves any conduct referred to in subparagraph (a)(i) of the definition "pornography" in section 138 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.	163. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant des conduites, scènes ou actes visés au sous-alinéa a)(i) de la définition de «pornographie» à l'article 138.	Spectacles pornographiques mettant en scène des enfants
Pornographic performances	163.1 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves any conduct referred to in subparagraph (a)(ii) of the definition "pornography" in section 138 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.	163.1 Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant des conduites, scènes ou actes visés au sous-alinéa a)(ii) de la définition de «pornographie» à l'article 138.	Spectacles pornographiques
Idem	163.2 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves any conduct referred to in any of subparagraphs (a)(iii) to (v) of the definition "pornography" in section 138 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.	163.2 Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans, soit d'une infraction punissable par procédure sommaire le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant des conduites, scènes ou actes mentionnés à l'un des sous-alinéas a)(iii) à (v) de la définition de «pornographie» à l'article 138.	Idem
Idem	163.3 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves any conduct referred to in subparagraph (a)(vi) of the definition	163.3 Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire le propriétaire, le locataire, le directeur ou	Idem

	<p>"pornography" in section 138 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction. 5</p>	<p>gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant des conduites, scènes ou actes mentionnés au sous-alinéa a)(vi) de la définition de «pornographie» à l'article 138. 5</p>	
Person taking part	<p>163.4 Every person who takes part or appears as an actor, performer or assistant in any capacity in a performance referred to in any of sections 163 to 163.3 is guilty of an offence punishable on summary conviction. 10</p>	<p>163.4 Est coupable d'une infraction punissable par procédure sommaire qui-conque participe comme acteur ou exécutant ou assistant en n'importe quelle qua-10 lité à un spectacle mentionné aux articles 163 à 163.3.</p>	Participants
Defence	<p>163.5 Where an accused is charged with an offence under section 163.2 or 163.3 or under section 163.4 in relation to an offence referred to in section 163.2 or 15 163.3, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the performance has artistic merit.</p>	<p>163.5 Le tribunal peut acquitter une personne accusée d'une infraction prévue aux articles 163.2 ou 163.3 ou d'une 15 infraction prévue à l'article 163.4 à l'égard d'un spectacle mentionné à l'un des articles 163.2 ou 163.3 si elle établit, selon la prépondérance des probabilités, que le spectacle a une valeur artistique. 20</p>	Moyens de défense
Mailing prohibited matter	<p>164. Every one who makes use of the 20 mails for the purpose of transmitting or delivering any pornography or any hate propaganda referred to in sections 281.1 to 281.3 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or of an offence punishable on summary conviction." 25</p>	<p>164. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire qui-conque transmet ou livre par la poste de la 25 pornographie ou des documents qui constituent de la propagande haineuse au sens des articles 281.1 à 281.3.</p>	Envois postaux interdits
c. 11 (1st Suppl.), s. 1	<p>3. Subsection 281.1(4) of the said Act is repealed and the following substituted therefor: 30</p>	<p>3. Le paragraphe 281.1(4) de la même loi est abrogé et remplacé par ce qui suit : 30</p>	ch. 11 (1 ^{er} suppl.), art. 1
Definition of "identifiable group"	<p>"(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, sex, religion or ethnic origin."</p>	<p>"(4) Au présent article, «groupe identifiable» désigne toute section du public qui se distingue par la couleur, la race, le sexe, la religion ou l'origine ethnique."</p>	Définition de «groupe identifiable»
CONSEQUENTIAL AMENDMENTS		MODIFICATIONS CORRÉLATIVES	
R.S., c. C-41	Customs Tariff	Tarif des douanes	S.R., ch. C-41
1985, c. 12, s. 1	<p>4. Tariff item 99201-1 of Schedule C to 35 the Customs Tariff is repealed and the following substituted therefor:</p> <p>"99201-1 Any thing that is</p> <p>(a) pornography, as that term is defined in section 138 of the Criminal Code, 40 other than</p> <p>(i) any matter that is referred to in any of subparagraphs (a)(iii) to (vi) of that definition, or</p>	<p>4. Le numéro tarifaire 99201-1 de la liste 35 C du Tarif des douanes est abrogé et remplacé par ce qui suit :</p> <p>«99201-1 Toute chose qui</p> <p>a) constitue de la pornographie au sens de la définition de l'article 138 du Code 40 criminel, à l'exception du matériel visuel qui représente des conduites, scènes ou actes visés aux sous-alinéas a)(iii) à (vi) de cette définition ou des objets ou com-</p>	1985, ch. 12, art. 1

(ii) any matter or commercial communication that is referred to in paragraph (b) of that definition that deals with conduct referred to in any of the subparagraphs referred to in subparagraph (i), 5

and that has artistic merit or an educational, scientific or medical purpose or that is imported exclusively by and for the use of an institution established 10 solely for an educational, scientific or medical purpose and not for distribution except to such an institution;

(b) hate propaganda within the meaning of subsection 281.3(8) of the *Criminal Code*; 15

(c) of a treasonable character within the meaning of section 46 of the *Criminal Code*; or

(d) of a seditious character within the 20 meaning of sections 60 and 61 of the *Criminal Code*."

munications commerciales mentionnés à l'alinéa b) de cette définition et qui visent des conduites, scènes ou actes mentionnés à l'un de ces sous-alinéas et qui, dans l'un et l'autre cas, ont une 5 valeur artistique ou un but éducatif, scientifique ou médical ou sont importés par un établissement constitué uniquement dans un but éducatif, scientifique ou médical pour son propre usage ou 10 celui d'un autre établissement semblable;

b) constitue de la propagande haineuse au sens du paragraphe 281.3(8) du *Code criminel*; 15

c) est de nature à fomenter la trahison au sens de l'article 46 du *Code criminel*;

d) est de nature à fomenter la sédition au sens des articles 60 et 61 du *Code criminel*. 20

1986, c. 35

An Act to amend the Judges Act and other Acts in relation to judicial matters

Loi modifiant la Loi sur les juges et d'autres lois relativement à des questions judiciaires

1986, ch. 35

5. Subitem 7(4) of the schedule to *An Act to amend the Judges Act and other Acts in relation to judicial matters* is repealed.

5. Le paragraphe 7(4) de l'annexe de la *Loi modifiant la Loi sur les juges et d'autres lois relativement à des questions judiciaires* est abrogé.

COMING INTO FORCE

ENTRÉE EN VIGUEUR

Coming into force

6. This Act or any provision thereof shall come into force on a day or days to be fixed by proclamation.

6. La présente loi ou telle de ses dispositions entre en vigueur à la date ou aux dates 25 fixées par proclamation. Entrée en vigueur

MEMO

TO: BPDC
FROM: p. bartlett and Charles Campbell
RE: Bill C-54: Summary Outline
DATE: 27 October 1987

S e c t i o n N u m b e r i n P r o p o s e d A c t	Description of Content and Comments
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Definitions

- | | |
|------------|--|
| 138 | definitions of 'erotica' and 'pornography' |
| | "erotica" defined as visual matter, dominant characteristic of which is depiction of sexual organ, breast, anal region in sexual context or for purposes of sexual stimulation. |
| | Comment: vagueness in phrases "dominant characteristic", "sexual context", "for purposes of sexual stimulation". Vague on whether explicitness or nudity actually required. |
| 138 | definition of "pornography" |
| | General comment: definition is sweeping and inclusive |
| (a) (i) | sexual activity involving children as participants or viewers |
| | Comment: sweeping and inclusive. No defense of artistic merit or educational purposes available for offences relating to this clause. Vagueness of phrases mentioned above under 'erotica' definition, plus "person who is or is depicted as being" under the age of eighteen years. |

- (ii) permanent impairment of the body in sexual context
Comment: no defense of artistic meritor educational purposes available for offences related to this clause.
- (iii) sexual and other violence
- (iv) degrading sexuality
Comment: vagueness of term "degrading"
- (v) bestiality, incest, necrophilia
- (vi) masturbation, ejaculation, anal/oral/vaginal intercourse.
Comment: degree of explicitness not specified.
- (b) matter inciting or promoting conduct in (i) to (v), above.
Comment: vagueness of what constitutes "incite, promote, encourage, advocate". Covers any material, visual or otherwise.

Offences

- 159 (1) "dealing" in pornography an offence
- (2) "dealing" definition: includes imports, makes, sells, publishes, etc. pornography
- (3) Maximum ten year penalty if involves children, or permanent impairment of the body in sexual context
- (4) Maximum penalty of five years for material in (a)(ii) to (v), above.
- (5) Maximum penalty for dealing in other pornography: two years.

159.1 Defense of artistic merit or educational, scientific, or medical purpose, unless material involves children or permanent impairment of body

Comment: vagueness and subjectivity of "artistic merit", "educational, medical, scientific" purpose. Onus of proof on accused

If defense successful, court to declare that material not pornography

159.2 (1) Persons producing child pornography liable to ten years in prison

(2) Persons possessing child pornography for personal use liable to six months

Comment: possession of pornography for personal use is not an offense known in Canadian criminal law at this time.

159.3 Defense to child pornography charges if accused took all reasonable steps to ensure that no one was under 18, or depicted as under 18

Comment: what are "all reasonable steps"? Onus on accused.

159.4 Maximum 6 months for exhibition of erotica to persons under 18

159.5 Maximum 6 months for selling, renting erotica to persons under 18

Comment re 159.4 and 159.5: This duplicates provincial censorship laws under the Theatres Act, which cover theatrical display and rental of films, videos. The section also covers books and other forms of erotica, which are often regulated elsewhere by municipal by-laws. There will be further constitutional litigation for encroaching on the freshly defined and expanded federal criminal law power. Prediction: the courts will allow both laws to stand. Issue: is criminalization necessary?

159.6 (a) Taking reasonable steps to ensure that material not erotica constitutes defense under 159.4, 159.5.

(b) Artistic merit or educational purpose constitutes defense under 159.4, 159.5

Comment: see comments concerning vagueness of artistic merit and educational purpose defenses, above. Onus on accused.

(c) Censor board authorizing distribution constitutes defense under 159.4, 159.5

159.7 Display of erotica in manner visible to public nets maximum 6 months

Comment: This duplicates municipal by-laws on display of erotica. These by-laws have been subject to challenge for vagueness. The municipal by-laws will be subject to a new set of constitutional cases for encroaching on the freshly defined and expanded criminal law power. Prediction: the courts will allow both laws to stand. Issue: is criminalization necessary?

159.8 Defenses to 159.7: taking all reasonable steps to ensure that not erotica; artistic merit or scientific, educational, medical purpose. Onus on accused.

160 Procedures regarding seizures.

Comment: artistic merit, educational purpose not relevant to decision whether or not to seize. Without court application, it is not possible to determine what is pornographic prior to seizure and resulting trial.

161 Tied sales.

162-163.5 Pornographic theatrical performances

162 Using, inducing, inciting or agreeing to use person under 18 in pornographic performance is an offence, with maximum penalty 10 years in prison. Depicting a person under the age of eighteen years in such a performance carries a similar penalty.

Artistic merit is not a defense; taking reasonable steps to ensure that no person is under eighteen is a defense.

163 Owner, lessees and managers of theatres in which performance of pornographic activity involving children guilty of offense, with maximum penalty of ten years in prison.

163.1 Owners, lessees and managers of theatres in which pornographic performances involving bodily impairment liable to imprisonment for ten years.

163.2 Owners, lessees and managers of theatres in which pornographic performances referred to in ss. (iii) to (v) of definition of pornography liable to imprisonment for five years.

163.3 Owners, lessees and managers of theatres in which pornographic performances referred to in ss. (vi) of definition of pornography liable to two years imprisonment.

163.4 Everyone taking part in such performances liable to imprisonment for six months.

163.5 Artistic merit a defense for offences under s. 161.2-161.4.

Comment: onus on accused. _____

164 Mailing pornography or hate propaganda is an offence, with maximum penalty of two years imprisonment.

Comment: this overlaps with the regulations under the Canada Post Act. Again, the issue is whether criminalization is necessary.

End of Consequential amendments to Customs Tariff Act,
bill: making it illegal to import pornography referred
to in (a)(i) and (ii) of the definition (children
and permanent impairment of body), and pornography
in (a)(iii) to (vi) and (b) of the definition if
such does not have an educational purpose or
artistic merit.

Comment: - Unlike everywhere else in the
act, the onus of proving lack of
artistic merit or educational purpose is
on the customs official seeking to keep
the material out.

- The effect is that customs
officials will only be concerned
with "kiddie porn" & "sexual
injury", ~~and~~ something of a
restriction of their current
powers

25. Indeed, the standards applied by the Ontario Film Review Board in this case are directly at odds with the recent decision in R. v. Doug Rankine. That case held that scenes of fellatio and anal sex, the types of sex depicted in Amerika, were not obscene and are within "community standards".

R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd. (1983), 36 C.R. (3d) 154

All of which is respectfully submitted,

Charles Campbell

Ellen Murray

EXPLANATORY NOTES

Criminal Code

Clause 1: New. These definitions would be required for the new offences proposed by clause 2.

NOTES EXPLICATIVES

Code criminel

Article 1. — Nouveau. Les définitions découlent des nouvelles infractions prévues à l'article 2.

Clause 2: New. The proposed sections 159 to 159.8 would replace the offences of corrupting morals, the "obscenity" and "crime comic" provisions of sections 159 and 160, the restrictions on publication of section 162, and make consequential changes to sections 160, 161, 164 and 165. The proposed sections 163 to 163.4 would deal with various theatrical performances.

Sections 159 to 165 at present read as follows:

"159. (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, sells, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(b) makes, prints, publishes, distributes, circulates, or has in his possession for the purposes of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(b) publicly exhibits a disgusting object or an indecent show,

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other

Article 2. — Les nouveaux articles 159 à 159.8 remplacent les infractions de «corruption des mœurs», les dispositions qui visent l'obscénité et les «histoires illustrées de crime» aux articles 159 et 160 et celles qui concernent les restrictions quant à la publication de certains renseignements à l'article 162; l'article apporte aussi des modifications corrélatives aux articles 160, 161, 164 et 165. Les nouveaux articles 163 à 163.4 interdisent certains spectacles.

Texte actuel des articles 159 à 165 :

"159. (1) Commet une infraction, quiconque

a) produit, imprime, publie, distribue, met en circulation, ou a en sa possession aux fins de publier, distribuer ou mettre en circulation, quelque écrit, image, modèle, disque de phonographe ou autre chose obscène, ou

b) produit, imprime, publie, distribue, vend, ou en sa possession aux fins de publier, distribuer ou mettre en circulation, une histoire de crime.

(2) Commet une infraction, quiconque, sciemment et sans justification ni excuse légitime,

a) vend, expose à la vue du public, ou a en sa possession, à une telle fin, quelque écrit, image, modèle, disque de phonographe ou autre chose obscène,

b) publiquement expose un objet révoltant ou montre un spectacle indécent,

c) offre en vente, annonce ou a, pour le vendre ou en disposer, quelque moyen, indication, médicament, drogue ou article destiné à provoquer un avortement ou une fausse-couche, ou représenté comme un moyen de provoquer un avortement ou une fausse-couche, ou fait paraître une telle annonce, ou

d) annonce quelque moyen, indication, médicament, drogue ou article ayant pour objet, ou représenté comme un moyen de rétablir la virilité sexuelle, ou de guérir des maladies vénériennes ou maladies des organes génitaux, ou en publie une annonce.

(3) Nul ne doit être déclaré coupable d'une infraction aux termes du présent article s'il établit que les actes qui, d'après l'allégation, constituent l'infraction, ont servi le bien public et que les actes allégués n'ont pas outrepassé ce qui a servi le public.

(4) Aux fins du présent article, la question de savoir si un acte a servi le bien public et s'il y a preuve que l'acte allégué a outrepassé ce qui a servi le bien public, est une question de droit, mais celle de savoir si les actes ont ou n'ont pas outrepassé ce qui a servi le bien public est une question de fait.

(5) Pour l'application du présent article, les motifs d'un prévenu sont hors de cause.

thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

- (a) the commission of crimes, real or fictitious, or
- (b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is *obscene or a crime comic* shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be *obscene or a crime comic* may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is *obscene or a crime comic*, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is *obscene or a crime comic*, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

- (a) on any ground of appeal that involves a question of law alone,
- (b) on any ground of appeal that involves a question of fact alone, or
- (c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 601 to 624 apply *mutatis mutandis*.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication no proceedings shall be instituted or continued in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section

"court" means

(a) in the Province of Quebec, the provincial court, the court of the sessions of the peace, the municipal court of Montreal and the municipal court of Quebec;

(a.1) in the Provinces of New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of Queen's Bench;

(b) in the Province of Prince Edward Island, the Supreme Court; or

(c) in any other province, a county or district court.

"crime comic" has the same meaning as it has in section 159;

"judge" means a judge of a court.

(6) Lorsqu'un prévenu est inculqué d'une infraction visée par le paragraphe (1), le fait qu'il ignorait la nature ou la présence de la matière, de l'image, du modèle, du disque de phonographe, de l'histoire illustrée de crime ou de l'autre chose au moyen ou à l'égard de laquelle l'infraction a été commise, ne constitue pas une défense contre l'inculpation.

(7) Au présent article, l'expression «histoire illustrée de crime» signifie un magazine, périodique ou livre comprenant, exclusivement ou pour une grande part, de la matière qui représente, au moyen d'illustrations,

- a) la perpétration de crimes, réels ou fictifs, ou
- b) des événements se rattachant à la perpétration de crimes, réels ou fictifs, qui ont lieu avant ou après la perpétration du crime.

(8) Aux fins de la présente loi, est réputée obscène toute publication dont une caractéristique dominante est l'exploitation indue des choses sexuelles, ou de choses sexuelles et de l'un quelconque ou plusieurs des sujets suivants, savoirs : le crime, l'horreur, la cruauté et la violence.

160. (1) Un juge convaincu, par une dénonciation sous serment, qu'il existe des motifs raisonnables de croire qu'une publication dont des exemplaires sont tenus, aux fins de vente ou distribution, dans un local du ressort de la cour, est obscène ou est une histoire illustrée de crime, doit émettre, sous son seing, un mandat autorisant la saisie des exemplaires.

(2) Dans un délai de sept jours après l'émission du mandat, le juge doit lancer une sommation contre l'occupant du local, astreignant cet occupant à comparaître devant la cour et à présenter les raisons pour lesquelles la matière saisie ne devrait pas être confisquée à l'égard de Sa Majesté.

(3) Le propriétaire ainsi que l'auteur de la matière saisie et qu'on prétend être obscène ou une histoire illustrée de crime peuvent comparaître et être représentés dans les procédures pour s'opposer à l'établissement d'une ordonnance portant confiscation de ladite matière.

(4) Si la cour est convaincue que la matière est obscène ou une histoire illustrée de crime, elle doit rendre une ordonnance la déclarant confisquée à l'égard de Sa Majesté du chef de la province où les procédures ont lieu, pour qu'il en soit disposé selon que le procureur général peut le prescrire.

(5) Si la cour n'est pas convaincue que la publication est obscène ou une histoire illustrée de crime, elle doit ordonner que la matière soit remise à la personne entre les mains de qui elle a été saisie, dès l'expiration du délai imparti pour un appel final.

(6) Il peut être interjeté appel d'une ordonnance rendue selon le paragraphe (4) ou (5) par toute personne qui a comparu dans les procédures

- a) pour tout motif d'appel comportant une question de droit seulement,
- b) pour tout motif d'appel comportant une question de fait seulement, ou
- c) pour tout motif d'appel comportant une question de droit et de fait,

comme s'il s'agissait d'un appel contre une déclaration de culpabilité ou contre un jugement ou verdict d'acquiescement, suivant le cas, sur une question de droit seulement en vertu de la Partie XVIII, et les articles 601 à 624 s'appliquent *mutatis mutandis*.

(7) Lorsqu'un juge a rendu une ordonnance, selon le présent article, dans une province relativement à un ou plusieurs exemplaires d'une publication, nulles procédures ne doivent être intentées ni continuées dans ladite province aux termes de l'article 159, en ce qui concerne ces exemplaires ou autres exemplaires de la même publication, sans le consentement du procureur général.

(8) Dans le présent article

161. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may be obscene or a crime comic.

162. (1) A proprietor, editor, master printer or publisher commits an offence who prints or publishes

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than

(i) the names, addresses and occupations of the parties and witnesses,

(ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given,

(iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and

(iv) the summing up of the judge, the finding of the jury and the judgment of the court and the observations that are made by the judge in giving judgment.

(2) Nothing in paragraph (1)(b) affects the operation of paragraph (1)(a).

(3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.

(4) This section does not apply to a person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report pursuant to directions of a court; or

(c) prints or publishes any matter

(i) in a volume or part of a *bona fide* series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is *bona fide* intended for circulation among members of the legal or medical profession.

163. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

164. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162(4).

165. Every one who commits an offence under section 159, 161, 162, 163 or 164 is guilty of

(a) an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction."

«cour» désigne,

a) dans la province de Québec, la Cour provinciale, la Cour des sessions de la paix, la Cour municipale de Montréal et la Cour municipale de Québec,

a.1) dans les provinces du Nouveau-Brunswick, du Manitoba, d'Alberta et de la Saskatchewan, la Cour du Banc de la Reine,

b) dans la province de l'Île-du-Prince-Édouard, la Cour suprême, ou

c) dans les autres provinces, une cour de comté ou de district;

«histoire illustrée de crime» a le sens que lui attribue l'article 159;

«juge» désigne un juge d'une cour.

161. Commet une infraction quiconque refuse de vendre ou fournir à toute autre personne des exemplaires d'une publication, pour la seule raison que cette personne refuse d'acheter ou d'acquiescer de lui des exemplaires d'une autre publication qu'elle peut, dans son appréhension, considérer comme obscène ou comme histoire illustrée de crime.

162. (1) Commet une infraction, un propriétaire, rédacteur, maître imprimeur ou éditeur qui imprime ou publie,

a) relativement à une procédure judiciaire, toute matière indécente ou tout détail médical, chirurgical ou physiologique indécent, lesquels, étant publiés sont de nature à offenser la morale publique;

b) relativement à une procédure judiciaire pour dissolution de mariage, annulation de mariage, séparation judiciaire, ou restitution de droits conjugaux, tout détail autre que

(i) les noms, adresses et professions ou occupations des parties et des témoins,

(ii) un exposé concis des accusations, défenses et contre-accusations à l'appui desquelles des témoignages ont été rendus,

(iii) les représentations sur tout point de droit surgissant au cours des procédures, et la décision rendue en l'espèce par le tribunal, et

(iv) le résumé du juge, le verdict du jury ainsi que le jugement du tribunal et les observations faites par le juge en rendant jugement.

(2) Rien à l'alinéa (1)b) n'atteint l'application de l'alinéa (1)a).

(3) Nulle procédure à l'égard d'une infraction visée par le présent article ne doit être intentée sans le consentement du procureur général.

(4) Le présent article ne s'applique pas à une personne qui

a) imprime ou publie une matière destinée à être employée en ce qui concerne des procédures judiciaires ou la communique à des personnes qui sont intéressées dans les procédures;

b) imprime ou publie un avis ou un rapport en conformité des instructions d'un tribunal; ou

c) imprime ou publie une matière

(i) dans un volume ou une partie d'une série authentique de rapports judiciaires qui n'appartient à aucune autre publication et consiste exclusivement en rapports de procédures devant des cours de justice, ou

(ii) dans une publication d'un caractère technique authentiquement destiné à circuler parmi les hommes de loi ou les médecins.

163 (1) Commet une infraction, quiconque, étant le locataire, gérant ou agent d'un théâtre, ou en ayant la charge, y présente ou donne, ou permet qu'y soit présenté ou donné, un spectacle, un divertissement ou une représentation immorale, indécente ou obscène.

(2) Commet une infraction, quiconque participe comme acteur ou exécutant, ou aide en n'importe quelle qualité, à un spectacle, à un divertissement ou à une représentation immorale, indécente ou obscène, ou y figure de la sorte, dans un théâtre.

164. Commet une infraction, quiconque se sert de la poste aux fins de transmettre ou de livrer quelque chose d'obscène, indécent, immoral

ou injurieux et grossier; mais le présent article ne s'applique pas à une personne qui se sert de la poste afin de transmettre ou de livrer une chose que mentionne le paragraphe 162(4).

165. Quiconque commet une infraction visée par l'article 159, 161, 162, 163 ou 164, est coupable

- a) d'un acte criminel et encourt un emprisonnement de deux ans, ou
- b) d'une infraction punissable sur déclaration sommaire de culpabilité.»

Clause 3: This amendment, which would add the underlined word, would broaden the scope of the "hate propaganda" offences.

Article 3. — Adjonction du mot souligné, ce qui étend la portée de l'infraction.

Customs Tariff

Clause 4: This amendment is consequential on clause 2.

Tariff item 99201-1 at present reads as follows:

"99201-1 Books, printed paper, drawings, paintings, prints, photographs or representations of any kind

- (a) of a treasonable or seditious character;
- (b) that are deemed to be obscene under subsection 159(8) of the *Criminal Code*; or
- (c) that constitute hate propaganda within the meaning of subsection 281.3(8) of the *Criminal Code*."

Tarif des douanes

Article 4. — Découle de l'article 2.

Texte actuel du numéro tarifaire 99201-1 :

"99201-1 Livres, imprimés, dessins, peintures, gravures, photographies ou reproductions de tout genre

- a) de nature à fomenter la trahison ou la sédition;
- b) réputés obscènes en vertu du paragraphe 159(8) du *Code criminel*; ou
- c) constituant de la propagande haineuse au sens du paragraphe 281.3(8) du *Code criminel*."

*An Act to amend the Judges Act and other Acts in relation
to judicial matters*

Clause 5: This repeal is consequential on the amendment to subsection 160(8) of the *Criminal Code* proposed by clause 2.

*Loi modifiant la Loi sur les juges et d'autres lois
relativement à des questions judiciaires*

*Article 5. — Découle du paragraphe 160(8) du Code
criminel que propose l'article 2.*

C-114

First Session, Thirty-third Parliament,
33-34-35 Elizabeth II, 1984-85-86

THE HOUSE OF COMMONS OF CANADA

BILL C-114

C-114

Première session, trente-troisième législature,
33-34-35 Elizabeth II, 1984-85-86

CHAMBRE DES COMMUNES DU CANADA

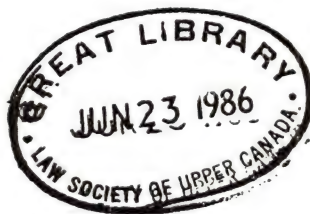
PROJET DE LOI C-114

An Act to amend the Criminal Code and the Customs
Tariff

Loi modifiant le Code criminel et le Tarif des douanes

First reading, June 10, 1986

Première lecture le 10 juin 1986



THE MINISTER OF JUSTICE

LE MINISTRE DE LA JUSTICE

1st Session, 33rd Parliament,
33-34-35 Elizabeth II, 1984-85-86

1^{re} session, 33^e législature,
33-34-35 Elizabeth II, 1984-85-86

THE HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C-114

PROJET DE LOI C-114

An Act to amend the Criminal Code and the
Customs Tariff

Loi modifiant le Code criminel et le Tarif des
douanes

Her Majesty, by and with the advice and
consent of the Senate and House of Com-
mons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consente-
ment du Sénat et de la Chambre des commu-
nes du Canada, décrète :

R.S., c. C-34;
cc. 11, 44 (1st
Suppl.); c. 2
(2nd Suppl.);
1972, cc. 13,
17; 1973-74, cc.
17, 38, 50;
1974-75-76, cc.
19, 48, 66, 86,
93, 105, 108;
1976-77, cc. 35,
53; 1977-78, c.
36; 1978-79, c.
10; 1980-81-82-
83, cc. 43,
47, 54, 99, 110,
125, 161; 1984,
cc. 21, 40, 41;
1985, cc. 19,
26, 44, 50, 52

CRIMINAL CODE

CODE CRIMINEL

S.R., ch. C-34;
ch. 11, 44 (1^{er}
suppl.); ch. 2,
(2^e suppl.);
1972, ch. 13,
17; 1973-74, ch.
17, 38, 50;
1974-75-76, ch.
19, 48, 66, 86,
93, 105, 108;
1976-77, ch. 35,
53; 1977-78, ch.
36; 1978-79, ch.
10; 1980-81-
82-83, ch. 43,
47, 54, 99, 110,
125, 161; 1984,
ch. 21, 40, 41;
1985, ch. 19,
26, 44, 50, 52

1. Section 138 of the *Criminal Code* is
amended by adding thereto, in alphabetical
order within the section, the following
definitions:

“degrading pornography” means any
pornography that shows defecation, uri-
nation, ejaculation or expectoration by
one person onto another, lactation, men-
struation, penetration of a bodily orifice
with an object, one person treating him-
self or another as an animal or object,
an act of bondage or any act in which
one person attempts to degrade himself
or another;

“degrading
pornography”
«document
pornographique
dégradant»

1. L'article 138 du *Code criminel* est
modifié par insertion, suivant l'ordre alpha-
bétique, de ce qui suit :

«comportement sexuel violent» Comporte-
ment — notamment toute forme
d'agression sexuelle — présenté dans
l'intention apparente d'apporter une
satisfaction ou une stimulation d'ordre
sexuel au spectateur et caractérisé par
des sévices exercés, réellement ou en
apparence, sur soi ou sur autrui.

«comportement
sexuel violent»
“sexually
violent
behavior”

«document pornographique» Représenta-
tion d'actes sexuels, notamment de rap-
ports sexuels vaginaux, anaux ou oraux,

«document
pornographi-
que»
“pornography”

"pornography"
«document
pornogra-
phique»

"pornography
that shows
physical harm"
«document
pornographique
à scènes de
séances»

"sexually
violent
behaviour"
«comportement
sexuel violent»

"pornography" means any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity;

"pornography that shows physical harm" means any pornography that shows a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions;

"sexually violent behaviour" includes sexual assault and any behaviour shown for the apparent purpose of causing sexual gratification to or stimulation of the viewer, in which physical pain is inflicted or apparently inflicted on a person by another person or by the person himself."

de comportements sexuels violents, d'actes de bestialité, d'inceste, de nécrophilie ou de masturbation ou de scènes d'éjaculation.

«document pornographique à scènes de séquences» Document pornographique montrant une personne en train de causer ou de tenter de causer à autrui, réellement ou en apparence, des lésions corporelles ou fonctionnelles permanentes ou étendues.

«document pornographique dégradant» Document pornographique montrant des scènes de défécation, de miction, d'éjaculation ou d'expectoration sur autrui, de lactation, de menstruation, de pénétration d'un orifice corporel avec un objet, des scènes où une personne traite autrui ou elle-même comme un animal ou un objet ou tente d'avilir autrui ou elle-même ou montrant des actes d'esclavage ou d'asservissement.

5 «document
pornographique
à scènes de
séquences»
"pornography
that shows
physical harm"

«document
pornographique
dégradant»
"degrading..."

1974-75-76, c.
48, s. 25; 1984,
c. 41, s. 2

2. Sections 159 to 165 of the said Act are repealed and the following substituted therefor:

2. Les articles 159 à 165 de la même loi sont abrogés et remplacés par ce qui suit :

1974-75-76, ch.
48, art. 25;
1984, ch. 41,
art. 2

Distribution of
pornography
that shows
physical harm

"159. (1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography that shows physical harm is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Sale or rental of
pornography
that shows
physical harm

(2) Every person who sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography that shows physical harm is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

Distribution of
degrading
pornography

159.1 (1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any degrading pornography is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

«159. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents pornographiques à scènes de séquences.

(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire, quiconque vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer des documents pornographiques à scènes de séquences.

159.1 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents pornographiques dégradants.

25 Distribution de
documents
pornographi-
ques à scènes de
séquences

Vente ou
location de
documents
pornographi-
ques à scènes de
séquences

Distribution de
documents
pornographi-
ques dégradants

Sale, rental or
display of
degrading
pornography

(2) Every person who

(a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any degrading pornography, or

(b) displays, in a way that is visible to a member of the public in a public place, any degrading pornography

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

Defences

(3) Where an accused is charged with an offence under subsection (1) or paragraph (2)(a), the court may find the accused not guilty if the accused proves that the degrading pornography has a genuine educational or scientific purpose or is a work of artistic merit.

Idem

(4) Where an accused is charged with an offence under paragraph (2)(b), the court may find the accused not guilty if the accused proves

(a) that the degrading pornography has a genuine educational or scientific purpose; or

(b) that the degrading pornography is a work of artistic merit and that an appropriate warning to the public was displayed.

Distribution of
violent
pornography

159.2 (1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography that shows sexually violent behaviour is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Sale, rental or
display of
violent
pornography

(2) Every person who

(a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography that shows sexually violent behaviour, or

(b) displays, in a way that is visible to a member of the public in a public place,

(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire, quiconque :

a) vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer des documents pornographiques dégradants;

b) expose à la vue de personnes qui se trouvent dans un endroit public des documents pornographiques dégradants.

Vente, location
ou exposition

(3) Le tribunal peut acquitter une personne accusée de l'infraction prévue au paragraphe (1) ou à l'alinéa (2)a) si elle démontre que les documents en question possèdent une valeur éducative ou scientifique véritable ou sont des oeuvres d'art.

Moyens de
défense

(4) Le tribunal peut acquitter une personne accusée de l'infraction prévue à l'alinéa (2)b) si, selon le cas, elle démontre que les documents en question :

a) possèdent une valeur éducative ou scientifique véritable;

b) sont des oeuvres d'art et qu'une mise en garde suffisante à l'intention du public était placée en évidence.

Idem

159.2 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents pornographiques montrant un comportement sexuel violent.

Distribution de
documents
pornographi-
ques montrant
un comporte-
ment sexuel
violent

(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire, quiconque :

a) vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer des documents pornographiques montrant un comportement sexuel violent;

Vente, location
ou exposition

	any pornography that shows sexually violent behaviour		b) expose à la vue de personnes qui se trouvent dans un endroit public des documents pornographiques montrant un comportement sexuel violent.	
Defences	is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.	5		
	(3) Where an accused is charged with an offence under subsection (1) or paragraph (2)(a), the court may find the accused not guilty if the accused proves that the pornography has a genuine educational or scientific purpose or is a work of artistic merit.	10	(3) Le tribunal peut acquitter une personne accusée de l'infraction prévue au paragraphe (1) ou à l'alinéa (2)a) si elle démontre que les documents en question possèdent une valeur éducative ou scientifique véritable ou sont des oeuvres d'art.	5 Moyens de défense 10
Idem	(4) Where an accused is charged with an offence under paragraph (2)(b), the court may find the accused not guilty if the accused proves	15	(4) Le tribunal peut acquitter une personne accusée de l'infraction prévue à l'alinéa (2)b) si, selon le cas, elle démontre que les documents en question :	Idem
	(a) that the pornography has a genuine educational or scientific purpose; or	20	a) possèdent une valeur éducative ou scientifique véritable;	
	(b) that the pornography is a work of artistic merit and that an appropriate warning to the public was displayed.		b) sont des oeuvres d'art et qu'une mise en garde suffisante à l'intention du public était placée en évidence.	
Distribution of pornography	159.3 (1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography other than pornography referred to in section 159, 159.1 or 159.2 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.	25	159.3 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents pornographiques autres que ceux visés aux articles 159, 159.1 ou 159.2.	20 Distribution d'autres documents pornographiques 25
Sale, rental or display of other pornography	(2) Every person who		(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire, quiconque :	Vente, location ou exposition
	(a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography referred to in subsection (1), or	35	a) vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer des documents pornographiques visés au paragraphe (1);	
	(b) displays, in a way that is visible to a member of the public in a public place, any pornography referred to in subsection (1)	40	b) expose à la vue de personnes qui se trouvent dans un endroit public des documents pornographiques visés au paragraphe (1).	40
Defences	is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.	45		
	(3) Where an accused is charged with an offence under subsection (1) or para-		(3) Le tribunal peut acquitter une personne accusée de l'infraction prévue au	Moyens de défense

graph (2)(a), the court may find the accused not guilty if the accused proves that the pornography has a genuine educational or scientific purpose or is a work of artistic merit.

(4) Where an accused is charged with an offence under paragraph (2)(b), the court may find the accused not guilty if the accused proves

(a) that the pornography has a genuine educational or scientific purpose; or

(b) that the pornography is a work of artistic merit and that an appropriate warning to the public was displayed.

159.4 Every person who displays any pornography or other material in which the breasts or genitals are shown for a sexual purpose in a way that is visible to a member of the public in a public place unless the public must, in order to see the pornography or material, pass a prominent warning notice advising of the nature of the display therein or unless the pornography or material is hidden by a barrier or is covered by an opaque wrapper is guilty of an offence punishable on summary conviction.

159.5 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented any pornography or any material referred to in section 159.4 in the presence of a person under the age of eighteen years is guilty of an offence punishable on summary conviction.

159.6 (1) For the purposes of this section and of section 159.7, "pornographic material" means

(a) any matter the dominant contents of which are a description of masturbation or vaginal, anal or oral intercourse;

(b) any matter showing masturbation or vaginal, anal or oral intercourse; or

(c) any matter showing or describing (i) ejaculation, sexually violent behaviour, bestiality, incest or necrophilia, or

paragraphe (1) ou à l'alinéa (2)a si elle démontre que les documents en question possèdent une valeur éducative ou scientifique véritable ou sont des oeuvres d'art.

(4) Le tribunal peut acquitter une personne accusée de l'infraction prévue à l'alinéa (2)b si, selon le cas, elle démontre que les documents en question :

a) possèdent une valeur éducative ou scientifique véritable;

b) sont des oeuvres d'art et qu'une mise en garde suffisante à l'intention du public était placée en évidence.

159.4 Est coupable d'une infraction punissable par procédure sommaire qui expose à la vue de personnes qui se trouvent dans un endroit public des documents pornographiques ou d'autres documents montrant des seins ou des organes génitaux à des fins d'ordre sexuel sauf si, pour voir les documents, le public doit passer devant une mise en garde, placée en évidence, quant à leur nature, s'ils sont cachés par un panneau ou autre objet ou s'ils sont sous emballage opaque.

159.5 Est coupable d'une infraction punissable par procédure sommaire, le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soient présentés des documents pornographiques ou d'autres documents visés à l'article 159.4 en présence de personnes âgées de moins de dix-huit ans.

159.6 (1) Pour l'application du présent article et de l'article 159.7, «documents ou textes pornographiques» s'entend :

a) des documents ou textes dont le contenu principal consiste en des descriptions de rapports sexuels vaginaux, anaux ou oraux ou des actes de masturbation;

b) des documents montrant des rapports sexuels vaginaux, anaux ou oraux ou des actes de masturbation;

c) des documents ou textes montrant ou décrivant, selon le cas :

Idem

Display of pornography

Exhibition to person under 18

Definition

5 Idem

Exposition de documents pornographiques

Présentation aux mineurs

35 Définition

(ii) any act referred to in the definition of "degrading pornography" or of "pornography that shows physical harm" in section 138.

(i) des scènes d'éjaculation ou de comportement sexuel violent ou des actes de bestialité, d'inceste ou de nécrophilie,

(ii) des scènes visées à la définition de «document pornographique à scènes de sévices» ou de «document pornographique dégradant» à l'article 138.

Sale or rental to person under 18

(2) Every person who sells, rents or offers to sell or rent any pornographic material or any material referred to in section 159.4 to a person under the age of eighteen years is guilty of an offence punishable on summary conviction.

(2) Est coupable d'une infraction punissable par procédure sommaire quiconque vend, loue ou offre de vendre ou de louer des documents ou textes pornographiques ou d'autres documents visés à l'article 159.4 à une personne âgée de moins de dix-huit ans.

Vente ou location aux mineurs

Defences

159.7 It is a defence to a charge under section 159.5 or 159.6 that

(a) the accused used due care and diligence to ensure that there was no pornography or pornographic material, as the case may be, or material referred to in section 159.4 in the thing sold, rented, offered for sale or rental, presented or allowed to be presented;

(b) the pornography or pornographic material, as the case may be, or material referred to in section 159.4 has a genuine educational or scientific purpose and was sold, rented, offered for sale or rental, presented or allowed to be presented for that purpose; or

(c) according to the classification system made by or under a law in force in the province in which the pornography or pornographic material, as the case may be, or material referred to in section 159.4 was sold, rented, offered for sale or rental, presented or allowed to be presented, it had been classified or rated as acceptable for viewing by persons under the age of eighteen years.

159.7 Constitue un moyen de défense contre une accusation portée en vertu des articles 159.5 ou 159.6 le fait que, selon le cas :

Moyens de défense

a) l'accusé a pris toutes les mesures nécessaires pour s'assurer que les articles qu'il a vendus, loués, offerts en vente ou en location, ou présentés, ou dont il a permis la présentation, ne contenaient aucun document pornographique ou document ou texte pornographique, selon le cas, ou autre document visé à l'article 159.4;

b) les documents pornographiques ou documents ou textes pornographiques, selon le cas, ou autres documents visés à l'article 159.4 possèdent une valeur éducative ou scientifique véritable et ont été vendus, loués, offerts en vente ou location ou présentés, ou leur présentation a été permise, dans cette intention;

c) les documents pornographiques ou documents ou textes pornographiques, selon le cas, ou autres documents visés à l'article 159.4 qui ont donné lieu à l'accusation appartiennent, selon le système de classification établi sous le régime d'une règle de droit en vigueur dans la province où ils ont été vendus, loués, offerts en vente ou en location ou présentés, ou dans laquelle leur présentation a été permise, à la catégorie de ceux qui peuvent être présentés aux personnes âgées de moins de dix-huit ans.

Offer or sale of sexual aids

159.8 (1) Every person who

(a) sells or offers to sell a sexual aid to a person under the age of eighteen years, or

(b) displays a sexual aid, in a way that is visible to a person under the age of eighteen years who is in a public place, is guilty of an offence punishable on summary conviction.

Definition

(2) For the purposes of this section, "sexual aid" means any device, apparatus or object designed solely for the sexual stimulation of its user.

Warrant of seizure

160. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any thing kept for sale, rental, display or distribution in premises within the jurisdiction of the court is pornography referred to in section 159, 159.1, 159.2 or 159.3 or is any thing referred to in subsection 162(2) or section 162.1 shall issue a warrant under his hand authorizing seizure of the thing.

Summons to occupier

(2) Within seven days after the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring that occupier to appear before the court and show cause why the thing seized should not be forfeited to Her Majesty.

Owner and author may appear

(3) The owner and the author of the thing seized may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of that thing.

Order of forfeiture

(4) Where the prosecution satisfies the court beyond a reasonable doubt that the thing seized is pornography referred to in section 159, 159.1, 159.2 or 159.3 or is any thing referred to in subsection 162(2) or section 162.1, the court shall make an order declaring the thing forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

159.8 (1) Est coupable d'une infraction punissable par procédure sommaire qui-conque, selon le cas :

a) vend ou offre de vendre des aides à la sexualité à une personne âgée de moins de dix-huit ans;

b) expose des aides à la sexualité à la vue de personnes âgées de moins de dix-huit ans qui se trouvent dans un endroit public.

(2) Pour l'application du présent article, «aide à la sexualité» s'entend de tout appareil, dispositif ou autre objet destiné uniquement à stimuler sexuellement l'utilisateur.

160. (1) Le juge qui, par une dénonciation sous serment, est convaincu qu'il existe des motifs raisonnables de croire que des objets qui sont destinés à la vente, à la location, à l'exposition ou à la distribution et qui se trouvent dans un lieu du ressort du tribunal constituent des documents pornographiques visés aux articles 159, 159.1, 159.2 ou 159.3 ou des documents visés au paragraphe 162(2) ou à l'article 162.1 délivre sous sa signature un mandat en autorisant la saisie.

(2) Dans les sept jours suivant la délivrance du mandat, le juge ordonne à l'occupant du lieu de comparaître devant le tribunal et de présenter ses arguments contre leur éventuelle confiscation au profit de Sa Majesté.

(3) Le propriétaire et le réalisateur des objets saisis peuvent comparaître et être représentés dans les procédures pour s'opposer à l'ordonnance de confiscation.

(4) Si le poursuivant le convainc hors de tout doute raisonnable que les objets saisis constituent des documents pornographiques visés aux articles 159, 159.1, 159.2 ou 159.3 ou des documents visés au paragraphe 162(2) ou à l'article 162.1, le tribunal en ordonne la confiscation au profit de Sa Majesté du chef de la province où les procédures ont lieu, pour qu'il en soit dis-

Vente ou offre d'aides à la sexualité

Définition

Mandat de saisie

Sommaton à l'occupant

Comparution

Ordonnance de confiscation

Return of thing
seized

(5) Where the court is not satisfied that the thing seized is pornography referred to in section 159, 159.1, 159.2 or 159.3 or is any thing referred to in subsection 162(2) or section 162.1, the court shall order that the thing be restored to the person from whom it was seized as soon as the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law under Part XVIII and that Part applies, with such modifications as the circumstances require, to an appeal pursuant to this subsection.

Consent

(7) Where an order has been made under this section by a judge in a province with respect to any thing, no proceedings shall be instituted or continued in that province under section 159, 159.1, 159.2, 159.3, subsection 162(2), (3) or (4) or section 162.1 with respect to that thing or any copy of that thing without the consent of the Attorney General.

Definitions

(8) In this section, "court" means

- (a) in the Province of Quebec, the provincial court, the court of sessions of the peace, the municipal court of Montreal and the municipal court of Quebec,
- (b) in the Provinces of New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of Queen's Bench,
- (c) in the Province of Prince Edward Island, the Supreme Court, or
- (d) in any other province, a county or district court;

"judge" means a judge of a court.

Tied sale

161. Every person who refuses to sell or supply to any other person any thing for

posé selon les instructions du procureur général.

(5) S'il n'est pas convaincu qu'il s'agit de documents pornographiques visés aux articles 159, 159.1, 159.2 ou 159.3 ou des documents visés au paragraphe 162(2) ou à l'article 162.1, le tribunal ordonne que les objets soient restitués au saisi dès l'expiration du délai d'appel en dernier ressort.

Restitution au
saisi

(6) Il peut être interjeté appel d'une ordonnance rendue en vertu du paragraphe (4) ou (5) par toute personne qui a comparu au cours des procédures comme s'il s'agissait d'un appel contre une déclaration de culpabilité ou contre un jugement ou verdict d'acquiescement, selon le cas, sur une question de droit, en vertu de la partie XVIII; cette partie s'applique, compte tenu des adaptations de circonstance, à un appel interjeté en vertu du présent paragraphe.

Appel

(7) Lorsqu'un juge a, dans une province, rendu une ordonnance à l'égard de certains objets, des procédures ne peuvent être intentées ou poursuivies dans cette province en vertu des articles 159, 159.1, 159.2, 159.3, des paragraphes 162(2) à (4) ou de l'article 162.1 à l'égard de ces objets ou de leurs reproductions, sans le consentement du procureur général.

Consentement

(8) Les définitions qui suivent s'appliquent au présent article.

Définition

«tribunal»

«tribunal»

- a) Au Québec, la Cour provinciale, la Cour des sessions de la paix, la Cour municipale de Montréal et la Cour municipale de Québec;
- b) au Nouveau-Brunswick, au Manitoba, en Alberta et en Saskatchewan, la Cour du Banc de la Reine;
- c) dans l'Île-du-Prince-Édouard, la Cour suprême;
- d) dans les autres provinces, une cour de comté ou de district.

«juge» Juge d'un tribunal.

45 «juge»

161. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de

Vente liée

the reason only that the other person refuses to purchase or acquire from him any other thing that the other person is apprehensive might be pornography referred to in section 159, 159.1, 159.2 or 159.3 or any thing referred to in subsection 162(2) or section 162.1 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years.

Children in pornography

162. (1) Every person who uses, induces, incites, coerces or agrees to use a person who is or appears to be under the age of eighteen years to participate in a performance or in the production of a visual representation of sexual conduct is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Distribution of child pornography

(2) Every person who imports, makes, 20 prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any visual representation of sexual conduct that shows a person who is or appears to be under the age of eighteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Sale, rental or display of child pornography

(3) Every person who sells, rents, offers to sell or rent, receives for sale or rental, 30 possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, any visual representation of sexual conduct that shows a person who is or appears to be under the age of eighteen years

(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on 40 summary conviction and is liable to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Possession

(4) Every person who knowingly, without lawful justification or excuse, possesses any visual representation of sexual conduct that shows a person who is or appears to

deux ans quiconque refuse de vendre ou de fournir à une personne un objet pour la seule raison qu'elle refuse de lui acheter ou d'acquérir auprès de lui un autre objet susceptible, selon elle, de constituer un document pornographique visé aux articles 159, 159.1, 159.2 ou 159.3 ou un document visé au paragraphe 162(2) ou à l'article 162.1.

162. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque incite, engage ou force une personne réellement ou apparemment âgée de moins de dix-huit ans à participer à l'exécution ou à la production d'une représentation comportant des actes sexuels, ou emploie ou accepte d'employer une telle personne à ces fins.

Documents pornographiques mettant en scène des enfants

(2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de 20 dix ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents qui comportent la représentation d'actes 25 sexuels mettant en scène une personne réellement ou apparemment âgée de moins de dix-huit ans.

Distribution de documents pornographiques mettant en scène des enfants

(3) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal 30 de cinq ans, soit d'une infraction punissable par procédure sommaire et passible d'une amende maximale de cinq mille dollars et d'un emprisonnement maximal de six mois ou de l'une de ces peines, quiconque vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer ou expose à la vue de personnes qui se trouvent dans un endroit public des documents qui com- 40 portent la représentation d'actes sexuels mettant en scène une personne réellement ou apparemment âgée de moins de dix-huit ans.

Vente, location ou exposition

(4) Est coupable d'une infraction punissable par procédure sommaire quiconque sciemment, sans justification ni excuse légitime, a en sa possession des documents

Possession

be under the age of eighteen years is guilty of an offence punishable on summary conviction.

Definition of
"sexual
conduct"

(5) For the purposes of this section, "sexual conduct" includes any conduct in which an actual or simulated act of vaginal, oral or anal intercourse, bestiality, masturbation, sexually violent behaviour, exhibition of the breasts or the genitals for a sexual purpose or any act referred to in the definition of "degrading pornography" or of "pornography that shows physical harm" in section 138 is shown.

Distribution of
pornography
advocating
child sexual
abuse

162.1 (1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any thing that advocates, encourages, condones or presents as normal child sexual abuse is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Sale, rental or
lay of
pornography
advocating
child sexual
abuse

(2) Every person who sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, any thing referred to in subsection (1) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

Possession

(3) Every person who, without lawful justification or excuse, possesses any thing referred to in subsection (1) is guilty of an offence punishable on summary conviction.

No defence

(4) It is not a defence to a charge under subsection (1), (2) or (3) that the accused was ignorant of the character of the thing unless the accused took all reasonable steps to ascertain its character.

Definition of
"child sexual
abuse"

(5) For the purposes of this section and of section 163, "child sexual abuse" means any sexual activity or conduct directed against or performed with or by a person who is or appears to be under the age of 18

qui montrent des actes sexuels mettant en scène une personne réellement ou apparemment âgée de moins de dix-huit ans.

Actes sexuels

(5) Pour l'application du présent article, sont notamment considérés comme des actes sexuels les actes suivants, réels ou simulés : rapports sexuels vaginaux, oraux ou anaux, bestialité, masturbation, comportement sexuel violent, l'exhibition, à des fins d'ordre sexuel, des seins ou des organes génitaux et tout acte mentionné à la définition de «document pornographique à scènes de sévices» ou de «document pornographique dégradant» à l'article 138.

162.1 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque importe, fabrique, imprime, publie, diffuse à la télévision, distribue ou a en sa possession dans l'intention de les distribuer des documents qui préconisent, encouragent, approuvent ou présentent comme normale l'exploitation sexuelle des enfants.

Distribution de
documents
pornographi-
ques tendant à
promouvoir
l'exploitation
sexuelle des
enfants

(2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans toute personne qui vend, loue, offre de vendre ou de louer, reçoit ou a en sa possession dans l'intention de les vendre ou de les louer ou expose à la vue de personnes qui se trouvent dans un endroit public des documents visés au paragraphe (1).

Vente, location
ou exposition

(3) Est coupable d'une infraction punissable par procédure sommaire quiconque, sans justification ni excuse légitime, a en sa possession des documents visés au paragraphe (1).

Possession

(4) Le fait que l'accusé ignorait la nature des documents en question ne constitue pas un moyen de défense contre une accusation portée en vertu du paragraphe (1), (2) ou (3), sauf s'il a pris toutes les mesures raisonnables pour s'assurer de la nature de ceux-ci.

Irrecevabilité
de certains
moyens de
défense

(5) Pour l'application du présent article et de l'article 163, «exploitation sexuelle des enfants» s'entend de tous actes sexuels commis contre, avec ou par une personne réellement ou apparemment âgée de moins

Définition de
«exploitation
sexuelle des
enfants»

eighteen years that is prohibited by this Act.

de dix-huit ans et interdits par la présente loi.

Theatrical Performances

Spectacles

Child sexual abuse

163. Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that advocates, encourages, condones or presents as normal child sexual abuse is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

163. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle qui préconise, encourage, approuve ou présente comme normale l'exploitation sexuelle des enfants.

Exploitation sexuelle des enfants

Physical harm

163.1 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves, in a sexual context, a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

163.1 Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant, dans un contexte sexuel, une personne en train de causer ou de tenter de causer à autrui, réellement ou en apparence, des lésions corporelles ou fonctionnelles permanentes ou étendues.

Scènes de violence

Degrading or violent acts

163.2 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves actual or simulated acts of sexually violent behaviour, bestiality, incest, necrophilia, bondage or any act in which one person attempts to degrade himself or another is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

163.2 Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans, soit d'une infraction punissable par procédure sommaire, le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant — qu'ils soient réels ou simulés — des actes de comportement sexuel violent, de bestialité, d'inceste ou de nécrophilie ou des scènes où une personne tente d'avilir autrui ou elle-même ou des scènes montrant des actes d'esclavage ou d'asservissement.

Actes dégradants

Sexual acts

163.3 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented a performance that involves actual or simulated acts of vaginal, anal or oral intercourse, masturbation or group sex is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

163.3 Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire, le propriétaire, le locataire, le directeur ou gérant ou le responsable d'un théâtre qui présente ou permet que soit présenté un spectacle montrant — qu'ils soient réels ou simulés — des rapports sexuels vaginaux, oraux ou anaux, des actes de masturbation ou des actes sexuels collectifs.

Actes sexuels

Person taking part

163.4 Every person who takes part or appears as an actor, performer or assistant

163.4 Est coupable d'une infraction punissable par procédure sommaire qui

Participants

in any capacity in a performance referred to in any of sections 163 to 163.3 is guilty of an offence punishable on summary conviction.

Defence

163.5 Where an accused is charged with an offence under any of sections 163.1 to 163.4, the court may find the accused not guilty if the accused proves that the performance is a work of artistic merit.

conque participe comme acteur ou exécutant ou aide en n'importe quelle qualité à un spectacle mentionné aux articles 163 à 163.3.

163.5 Le tribunal peut acquitter une personne accusée d'une infraction prévue aux articles 163.1 à 163.4 si elle démontre que le spectacle est une oeuvre d'art.

5 Moyens de défense

Mailing prohibited material

164. Every one who makes use of the mails for the purpose of transmitting or delivering any thing referred to in section 159, 159.1, 159.2, 159.3 or 162.1, or in subsection 162(2), or any hate propaganda referred to in sections 281.1 to 281.3 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction."

164. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans, soit d'une infraction punissable par procédure sommaire qui-conque transmet ou livre par la poste des documents visés aux articles 159, 159.1, 159.2 159.3 ou 162.1 ou au paragraphe 162(2) ou des documents qui constituent de la propagande haineuse au sens des articles 281.1 à 281.3.

Envois postaux interdits

c. 11 (1st Supp.), s. 1

3. Subsection 281.1(4) of the said Act is repealed and the following substituted therefor:

3. Le paragraphe 281.1(4) de la même loi est abrogé et remplacé par ce qui suit :

ch. 11(1^{er} suppl.), art. 1

Definition of "identifiable group"

"(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, sex, religion or ethnic origin."

«(4) Au présent article, «groupe identifiable» désigne toute section du public qui se distingue par la couleur, la race, le sexe, la religion ou l'origine ethnique.»

«Groupe identifiable»

R.S., c. C-41

CUSTOMS TARIFF

TARIF DES DOUANES

S.R., ch. C-41

1985, c. 12, s. 1

4. Tariff item 99201-1 of Schedule C to the *Customs Tariff* is repealed and the following substituted therefor:

4. Le numéro tarifaire 99201-1 de la liste C du *Tarif des douanes* est abrogé et remplacé par ce qui suit :

1985, ch. 12, art. 1

"99201-1 Any thing referred to in section 159, 159.1, 159.2 or 159.3 of the *Criminal Code*, other than a thing imported exclusively by and for the use of an institution established solely for an educational, scientific or medical purpose and not for distribution except to such an institution or a thing that has been declared by a court referred to in section 71 of the *Customs Act* to have a genuine educational, scientific, or medical purpose or to be a work of artistic merit, any thing referred to in section 162.1 or in subsection 162(2) of the *Criminal Code*, any thing that constitutes hate propaganda within the meaning of subsection 281.3(8) of the *Criminal*

«99201-1 Les documents ou objets qui sont visés aux articles 159, 159.1, 159.2 ou 159.3 du *Code criminel* à l'exception de ceux qui sont importés par un établissement constitué uniquement dans un but éducatif, médical ou scientifique pour son propre usage ou celui d'un autre établissement semblable ou qui ont fait l'objet d'une déclaration par le tribunal visé à l'article 71 de la *Loi sur les douanes* selon laquelle ils possèdent une valeur éducative, médicale ou scientifique véritable ou sont des oeuvres d'art, les documents ou objets qui sont visés à l'article 162.1 ou au paragraphe 162(2) du *Code criminel*, les documents ou objets qui constituent de la pro-

Code, or any thing that is of a treasonable or seditious character."

pagande haineuse au sens du paragraphe 281.3(8) du *Code criminel* ou les documents ou objets qui sont de nature à fomenter la trahison ou la sédition.»

COMING INTO FORCE

ENTRÉE EN VIGUEUR

Coming into
force

5. This Act or any provision thereof shall come into force on a day or days to be fixed by proclamation.

5. La présente loi ou telle de ses dispositions entre en vigueur à la date ou aux dates 5 fixées par proclamation.

5 Entrée en
vigueur

MEMO

HISTORY

The past five years there has been three bills presented to parliament to amended to obscenities provisions of the criminal code.

They have been:

Bill C-19 / February 7, 1984 / by the Liberal Government.

Bill C-114 / June 10, 1986 / Crosby's "1st" attempt

Bill C-54

The Fraser Commission also made rather specific recommendations in its report published in 1985. The Fraser Commission was holding hearings across the and considering new legislation almost at the same time the Liberals Government was drafting and introducing Bill C-19.

BILL C-19

Generally viewed as an interim measure. It is a very modest amendment to the definition of obscenity. It proposed to substitute the following definition of obscenity for the one in the criminal code:

For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter of thing is the undue exploitation of any one or more of the following subjects, namely sex, violence, crime, horror or cruelty, through degrading representations of a male or female or in any other matter.

This Bill is put forward on the premise that material that was violent but not sexual was not captured by the existing obscenity definition.

This amendment is attacked because it still based the obscenity definition on the "undue exploitation" which was taken to mean the relevant "community standards" as understood in the existing legislation. It was also attacked because of the vagueness of the expression "or in any other manner".

THE FRASER COMMISSION

A copy of chapter 20 of the Fraser Commission is included in the materials. This chapter sets out their recommendations for the wording of a revised Criminal Code.

You will see here the origin of the three part definition of "pornography".

The underlined premise of the Fraser Commission recommendations was that the criminal code should be quite specific in the material that it "censors". This appeared to be a matter of principal as well as a matter of responding to the fear that the Charter of Rights might strike down something less precise on vagueness grounds.

The Fraser Commission recommendations were immediately attacked by a number of conservative groups who thought it to liberal. According to the Fraser recommendations, the display of visual pornographic material that depicted "vaginal, oral or anal intercourse, masturbation or lewd touching", would be criminal where the general public had access, but not otherwise. This meant in effect that a restricted sale of visual explicit sexual material would be lawful.

BILL C-114

The Conservative Governments first draft Bill followed the scheme of the Fraser Commission in dividing pornography into different levels. This Bill proposed to treat pornography as follows:

- a) a pornography which shows physical harm;
- b) degrading pornography;
- c) violent pornography; and,
- d) pornography

The definition of mere "pornography" was "any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity". Mr. Crosby was ridiculed about "other sexual activities". "What's left!"

Bill C-114 allowed for an "Artistic and Educational defence" with respect to degrading or violent pornography or mere pornography but not pornography that showed physical harm.

BILL C-54

In Bill C-54 the Government dropped the notorious "other forms of sexual activity". However, they added an equally controversial section creating a category of "pornography" pertaining entirely to the depiction of children in connection with other forms of pornography.

POSSIBLE AMENDMENTS

I believe the principal issue that will be debated in committee will be whether or not the 5th category of pornography in Bill C-54 being "the depiction of anal, vaginal or oral intercourse", that is not degrading or violent, should be included as pornography at all. I hope the National Action Committee will propose that this type of material be omitted from pornography and inserted in the category of erotica. This would mean that it would be illegal only to sell such material to minors or have it visible to the public.

This amendment would be consistent with what Fraser Commission recommended, and inconsistent with the Government attitude in Bill C-54 and Bill C-114.

Making the sale or public display of "Erotica" a crime seems excessive. Presumably municipal bylaws could regulate the nature and condition of sale, rather than criminalizing the subject. (This observation is not without constitutional difficulties. There have been a number of cases recently attacking municipal regulations that merely duplicated the Criminal Code provisions. However, for reasons that would be detailed in due course I do not believe this is a serious difficulty.)

However, accepting that the display and sale to minors of erotica can be a crime, the proposed bill still represents a substantial improvement from the proposed law, and perhaps the liberalization of the existing law.

I say "perhaps the liberalization" for the following reasons.

- the interpretation currently given to the "undue exploitations of sex" is that kind of depiction which offends "community standards". The most liberal test supplied in such cases these days seem to refer to the degree of the "explicitness". This definition appears to provide that the depiction of sexual activity no matter how explicit, provided that it is not sexually violent or degrading, is not obscene.
- For the gay community this would represent a substantial liberalization in that the test typically applied to gay sexual material is much tighter than with respect to heterosexual erotica on the premise that community tolerance is less. By spelling out specifically that anal intercourse is merely erotic, the amendment would equalize access to gay and straight erotica.

KIDDIE PORN

This section should be dropped entirely. None of the previous legislation seemed to feel the need to deal explicitly with type of material. Surely, all of the potential problems are covered by the overall definitions of pornography as degrading, violent etc.

BURDEN OF PROOF

This legislation continues to place the burden of proof on the possessor of the legibly pornographic material. For reasons outlined elsewhere we oppose this, and this provision should be reversed by amendment.

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Making Sense of Research on Pornography

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MAKING SENSE OF RESEARCH ON PORNOGRAPHY

Research on the effects of pornography is difficult to understand; in part, because the people who comment on it may have different philosophical, scientific or political orientations; in part, because they may be discussing different aspects of the same problems.

Not all scholars are interested in the effects of pornography. There are a number of historical studies¹ as well as discussions of the aesthetics of pornography.² And even in the various studies which are concerned with the effects of pornography, the term "effects" is not always used precisely or consistently. For example, it has been used to refer to:

- Information (sexual)

- fantasy (sexual)

- attitudes (long term or short terms)

 - towards same sex

 - towards opposite sex

 - towards self

- behaviour (antisocial)

 - violence

 - masturbation

 - rape

 - incest

 - child molesting

 - adultery

behavioural modifications

reinforcement (more of the same)

change (therapeutic; overcoming sexual dysfunctions)

mood-enhancement

affective states

embarrassment

guilt

aversion

pleasure

sexual stimulation

arousal (tumescence)

general excitement

With few exceptions the studies have not been integrated with the result that we do not have a cumulative and coherent body of knowledge.

In the following comments, I want to try and clarify some of the confusion and to indicate what we can and cannot deduce from existing evidence. No attempt will be made here to discuss psychological theories about why people are motivated or attracted to seek pornographic media, nor will there be any discussion of the issue of censorship. However, I will indicate, wherever appropriate, a feminist critique of the way the research has been conceptualized, its methodology, and the interpretation of its results.

I

Generally speaking, there are five areas of systematic research that have a bearing on pornography and its effects.

1. Studies of aggression. These are usually experimental and carried out by psychologists.
2. Studies of pornography. Some are experimental and carried out by psychologists; others have been field surveys concerning pornography, censorship and sexual practices. In addition, there have been studies of pornography consumers and studies of antipornography social movements. Much of this work has been done by sociologists.
3. Studies of sexual offenders. These may be large-scale statistical studies of persons convicted of sexual offences; or, small-scale clinical studies. The former are usually done by criminologists; the latter by psychiatrists.
4. Studies of aggression and pornography combined. Usually experimental and conducted by psychologists.
5. Studies of media influence. May be survey or experimental. Carried out by sociologists, political scientists and communication scholars.

In addition to the systematic studies there are analyses of pornography and interpretations of it by people in the humanities.

D. H. Lawrence, Simone de Beauvoir, George Steiner, Walter Berns, Sir Herbert Read are among those who have written on pornography and/or censorship.³

I want to begin by examining the aggression studies because they have influenced so much of the current discussion of pornography, and because feminists have increasingly defined such sexual offenses as rape as acts of aggression rather than acts of sexual gratification.

II

Aggression studies have a long tradition in psychology, but no one thought to relate them to media violence until, more by chance than design, Leonard Berkowitz used scenes from prizefight films in his research. Since then his work has been cited in discussions of media violence although it is generally recognized that not all violence is motivated by aggression.

The aggression (or media-violence) studies can be grouped on the basis of their methodologies and theories: 1) stimulus and response; 2) social learning; 3) cultivation hypothesis; and the 4) desensitization hypothesis.

1. Stimulus and Response. These studies, carried out by Berkowitz and his students (1962; 1963; 1964; 1965; 1966; 1967) were experimental studies. Matched groups (usually male college students) were compared before and after exposure to some kind of stimuli, usually scenes from a well-known prizefight film, Champion. The experimental group had been provoked in some way prior to the experience of seeing the ring scene from the film.

The Berkowitz S-R studies are important for two reasons. First, the results are clear cut. After exposure to the stimulus, the

experimental group was more predisposed to acts of violence toward others (not toward themselves) than the control groups. Second, the studies are the model for recent studies which combine violence and erotic imagery. Thus some of the criticisms which apply to the aggression studies apply, mutatis mutandis, to the violence and pornography studies.

First, the violence is taken out of context. Champion, for example, is not a particularly violent film. One scene is, but what an audience would be normally viewing is the entire film (McCormack, 1982). Moreover, the violence of a Western and the violence of a boxing film may have very different dramatic meaning (McCormack, 1980).

Second, the S-R model leaves out all inhibiting variables that normally enter into human behaviour. Other studies have demonstrated that despite the media examples and despite easy or unobserved opportunity, subjects resisted and did not engage in antisocial behaviour (Milgram and Shotland, 1973). We are, in fact, continually surrounded by anti-social stimuli and opportunities to which we either do not respond or, if we do, it is in socially acceptable and responsible ways. Part of our socialization is learning to recognize these situations and learning how to avoid temptation or how to deal with it.

Third, the post-experimental physiological effects may be of short duration.

Fourth, prizefight films may be evoking a latent homosexual response in male subjects which is then handled aggressively by them (McCormack, 1978). Thus the responses may be to something else, not the violence

as such on the screen. Tannenbaum (1970), for example, has suggested that various contextual variables, e.g. dim lights, watching alone or watching with others, etc. can significantly alter response.

There are still other criticisms, but these are the major ones. However, a special word need to be said here about the catharsis hypothesis.

Many persons regard the findings of the Berkowitz S-R studies as constituting a definitive refutation of the catharsis hypothesis. Briefly, the catharsis hypothesis (derived from psychoanalytic theory) predicts that anger or tension produced by frustration would be reduced through vicarious experience.

There are differences of opinion about how this reduction occurs--whether we "get it out of our system" by identifying with the symbolic aggressor e.g., John Wayne or whether the experience triggers our own inhibitory mechanisms or whether we discover through this imaginative exercise alternate nonviolent strategies for dealing with whatever is producing the hostility.

Despite all of these different theories about how it works, the outcome would be the same--less anger, less predisposition to hit. The findings are as predicted (Feshbach, 1955, 1961, 1969; Singer, 1968; Bramel et al., 1968; Feshbach and Singer, 1977). Many of these studies have been criticized for their definition of catharsis, and according to Scheff and Scheele (1980) a stronger case for catharsis could have been demonstrated. Be that as it may, most of the original studies on

the catharsis hypothesis were field studies, not lab studies, and for many scholars this gives them a credibility that lab studies do not have.

Nevertheless, there has been a dissatisfaction with the catharsis hypothesis. This may reflect the suspicion in academic circles and among positivist psychologists of anything psychoanalytic. (Freud did not use the term "catharsis" but his theories of jokes, dreams, etc. have suggested something like the Aristotelian concept.) But it probably also reflects a political impatience with the notion that what might be legitimate aggression is either displaced or defused through catharsis. Instead of getting angrier and more militant about the world's injustices we become more passive. The catharsis hypothesis offers no support for collective efforts to resolve problems; it also offers no support for those who want to intervene to change the person.

Meanwhile, we all wind-down with detective stories or we take our tired, angry, depressed, information-overloaded selves off to watch violent TV fantasies or horror movies for the pleasures and the escapist gratification they offer. When it is over, we feel better: less angry, less depressed, less fatigued--at least, temporarily. But it is also true that when people are required to carry out some difficult or unpleasant task, they may use the media to get themselves psyched-up to do it. In short, whether we appeal to scientific data or common sense, the problem remains unresolved: both reactions can and do occur.

2. Social Learning. Some of the dissatisfaction with the behaviouralism of Berkowitz and the psychoanalytic approach are reflected in the social learning or modeling studies conducted by

Bandura and his associates (1963a; 1963b; 1969; 1973). Like Berkowitz, Bandura is primarily interested in aggression and only secondarily in TV or other communication media. It is Freud's theory of aggression that he objects to rather than the concept of catharsis. In any case, Bandura departs from the Berkowitz paradigm in two ways.

First, he assumes that aggression is not an instinct or a drive to be controlled, but is, rather, learned behaviour. And second, it really does not matter whether tension is raised or lowered by exposure to media violence. What does matter is that subjects--especially young ones--imitate what they see on the TV screen, and this learning, according to Bandura, can be so powerful that any countervailing role-models either on the screen or in the child's immediate social environment--family, peers--are relatively unimportant. Finally, because children observe aggression so often on television, the patterns of response learned early in life remain with them. They are carried over into adult lives and become, like phobias, operative involuntarily when certain cues are present.

The criticisms of this perspective are extensive and based on different theories of child development as well as on media studies. Since our concern here is with adults and with pornography, we have simply noted them in passing.⁴ However, although the pornography question concerns adults primarily, it is in childhood that sex roles are learned; sex stereotypes in the media may reinforce these roles. And it is through the filter of sex-roles that children and adults learn by means of the media and other sources the specific norms of

sexual performance and sexual attitudes expected. In the Bandura studies and, as we shall indicate later, in most of the research, there are no "controls" for sex roles.

Second, it is from Bandura's social learning theories that the behavioural modification approach has been developed in which pornography may be used therapeutically to help persons overcome problems of sexual dysfunction. Feminists may object to the use of misogynist materials as therapeutic agents however valid the ends. They may also be inclined to suggest that in a patriarchal society certain forms of sexual dysfunction like frigidity in women may be more political than pathological.

Finally, there is a serious question of whether people, young or old, really do imitate what they see on television; and, if they do, why they imitate some forms of behaviour and not others. In effect, there is no place here for selectivity which could reflect, among other things, social values.

3. The Cultivation hypothesis. George Gerbner and his co-workers at the Annenberg School of Communication have been analyzing trends in TV violence and the effects of the media violence on how adult viewers construct social reality (1976a; 1976b). Gerbner argues that the problem is not explicit depictions of violence but what the violence represents in terms of social relationships; that is, in terms of power or dominance and submission. This is analogous to saying that it is not the sex or violence in hardcore pornography that is salient

to the viewer, but the sadomasochistic relationship. It would, then, be of no consequence whether the instrument of violence was a fist or a gun, a whip or a knife since the social message is the same.

He hypothesized that the long-term effects of heavy exposure to TV crime shows, for example, is not aggression or social learning, but anxiety about one's own helplessness. We begin to believe that the TV world is the real one and grow more fearful about our own personal safety on city streets. Eventually we become more supportive of extreme law-and-order measures which in reality may be both undesirable and unnecessary.

Gerbner's thesis is particularly relevant to women because, according to his indicators, women are proportionately more often the victims of violence than men. Constant exposure, or "cultivation" to this kind of television can, Gerbner asserts, lead to a state of mind in which women retreat further from the outside world.

Gerbner's statistics on the differences between light and heavy viewers have been questioned, and the theory itself has also been criticized. Very simply, why would people who are made anxious by what they see on TV become or continue to be heavy viewers? Either there is some positive or happy outcome on these shows that is not being measured, or, possibly, apprehensive people seek out the programmes which, despite the apprehension created do provide some kind of relief (Zillmann, 1980). More broadly put, television is an entertainment medium, and the people who watch it regularly expect that there will be shock, thrills, suspense, fear but ultimately a resolution that gives reassurance and pleasure.

As for viewing rape as an aggressive act, the figures do not indicate that heavy viewers would observe more incidents of rape than light viewers. Greenberg, et. al. (1980) who monitored prime-time TV found that rape was infrequent. The most common form of dubious sexual morality was sexual intercourse between unmarried persons, and even this transgression was more often referred to than observed directly. Thus, heavy viewers might be made anxious by crime shows, and women, in particular, may become unnecessarily worried about being mugged or taken hostage, but not about rape.

4. Desensitization. Eysenk and his associates have looked upon most research on violence or pornography as specious (1978). He makes a case for his own experimental methodology and his theory based on conditioning. Without going into either his methodology or his theory, he maintains that the effects of watching a great deal of TV violence is a lowering of anxiety, a process of unlearning and the gradual extinction of any sort of strong spontaneous reaction; in other words, desensitization.

Desensitization is difficult, if not impossible to prove. Eysenk spends a great deal of energy discrediting other people's evidence to the contrary. He interprets, for example, the statistics on the decline of sex offenses in countries where pornography has been made freely available as proof of his theory: the populations in these countries have become so desensitized that they no longer bother to report rape.

Although there are great differences cross-culturally in what people regard as sexual cruelty, it is difficult to believe that the women in Denmark or Sweden would become so blasé about rape. There is some experimental evidence that when people are heavily exposed to any form of erotica, coercive or noncoercive, they are less judgmental: they do not feel as strongly about the need for censorship as subjects who had less exposure, and they are less inclined to impose severe jail sentences on rapists (Zillmann and Bryant, 1982). But is this desensitization or is it a better understanding of the phenomenon?

Apart from Eysenk's idiosyncratic view of rape, there are some larger questions about the nature of desensitization. Is it a slippery slope or can it be reversed? Is it always undesirable? It seems fairly obvious that we do become desensitized to some degree. As we listen to the news every night about violence in Northern Ireland or in the Middle East, the first surprise and anger begin to wear off. But cooling-off can be desirable for a calmer and more analytic understanding of these complex events. Desensitization, then, is not necessarily maladaptive, and, it may be, to some degree, essential if we are to engage in rational discourse and arrive at wise social policies. Desensitization is not the same as moral callousness or cognitive indifference. As for the slippery slope, there are enough precedents in history to indicate that old injustices never die.

To summarize, then, the aggression studies touch on many of the issues being raised in contemporary discussions of pornography. Indeed, there is a tendency in some quarters to disregard the pornography

research entirely and to generalize from the aggression studies. But what the aggression studies show is that there can be both increase and decrease of a tendency toward aggression as a direct result of exposure to aggressive stimuli. Second, there are a variety of hypotheses about the effects of aggression stimuli on behaviour and attitudes; we are not, as is sometimes said in semi-popular discussions of the pornography issue, restricted to a choice between imitation or catharsis. Elsewhere I have indicated the possibilities of using "reference groups" theory (McCormack, 1978), but there are others as well.

III

Until recently, the U.S. Commission on Obscenity and Pornography (1970) was the major source of systematic data on pornography. The commission carried out a comprehensive examination which included experimental studies, surveys of attitudes, an examination of the economics of pornography, etc. Only those parts of the report that are relevant for our purposes here will be reviewed.

1. S-R experimental studies. These are similar in design to the earlier studies cited here on aggression, and the findings are also consistent: exposure to erotic stimuli leads to a short-term sexual arousal.

The immediate effect of the sexual arousal in the post-experimental period was an increase in sexual activity but in a manner consistent with the subject's usual practice. Despite repeated exposure to slides showing highly aberrant sexual activity, the subjects continued to perform as they had in the past; there were no innovations, no radical experiments.

These findings are consistent with our knowledge and theories of socialization. Sex practices, like other social practices, become habitual, routinized and, however boring, conventional. Like other social habits, we do not alter or break this one without some major incentive or without some serious disruption of our lives.

Third, the studies also confirm the importance of sex-role attitudes as a mediating variable. "Macho" men--those who scored high on masculinity scales--were more aroused by the stimuli than the more androgynous or homosexual men.

The data show, too, that erotic stimuli may lead to anti-social fantasy such as gang rape but not to any corresponding behaviour. However, it must be borne in mind that the subjects were university students who may well be persons who fantasize (daydream) as an end-in-itself more than other people. A later study looked more closely at whether or not the subject regarded the stimuli as pornographic (Fisher and Bryne, 1978). This turned out to be a better predictor--those who rated the film as pornographic increased their sexual activity in the following week more than those who thought it was not pornographic. Subjects who judged it to be pornographic had more conservative sex socialization.

Questions have been raised about the objective measurements of sexual arousal (Amoroso and Brown, 1973). The apparatus used to measure tumescence may itself stimulate response. Self-reports of sexual arousal may also be unreliable and incorrectly measured. If,

for example, subjects regard the stimuli in the experiments as repugnant, they may deny any sense of sexual excitement and, indeed, their responses may be delayed (Brown, et. al., 1976). I call attention to these problems because they apply to the current studies done of pornography and aggression which follow basically the same methodology.

2. Surveys of Social Attitudes. There have been many surveys done on attitudes toward pornography, on sexual practices and on censorship. Perhaps the most important finding for our purposes is that more than half of the persons questioned in 1970 believed that pornography was harmful but not to themselves or to people like themselves. Those who were most critical of pornography and most in favour of censorship (including censorship of libraries) were persons with a generally conservative social ideology and a strong religious background. A more recent survey among Canadians, indicate there was a similar correlation between religiosity (church attendance) and favouring censorship (Bibby, 1981). But apart from this group, there is the more general phenomenon of a disproportionate concern about pornography in the absence of any strong evidence of behavioural consequences (Bell, 1976).

3. Studies of Pornography Users. Studies of how and when people encounter pornography and become consumers of it indicate that most people discover pornography during childhood and in their own homes or through primary groups. Schoolyards, camps, the bedrooms of older siblings--these are the places that young children see the magazines,

pictures and other print media. But although the prepubescent boy or girl is aware of pornography they are not generally interested in it except as something teenagers like and collect in a clandestine way.

For obvious reasons adolescents are more consciously interested in pornography, more motivated to acquire and share it with their friends. Depending on their sex education, they may find it more or less instructive although their conversations with each other or the accounts given to them by others of personal experiences may function as a better source of "how-to" information and serve to demystify sexual intercourse. The evidence indicates that the most common sexual result of exposure to pornography for teenage boys is masturbation. Only later do they replace the "center-fold" female with a real one and masturbation with sexual intercourse. The point here is that there is a developmental process in the uses of pornography which is related to stages of sexual maturation.

One of the unexpected findings of the commission was that the regular adult consumers of pornography, people who regularly purchase erotic magazines, see erotic films, etc. represent a cross-section of the population. The data refute the stereotypes of users as teenage boys, "dirty old men," lonely salesmen or overly repressed men. Professional people, persons active in their communities, happily married couples and highly educated persons are as represented as all other social categories. Pornography has become a part of the life-style of middlebrow, middle class people who a generation earlier would either have been more secretive about it or felt more guilty about their interest.

It is this new reality of users that lies behind the discussions about "community standards" as a test of what constitutes pornography. Given the changes in our sex mores (most notably with respect to pre-marital sex) and changes in our attitudes toward greater tolerance of sexual diversity, there is very little that happens between consenting adults that is not within the bounds of community standards. And if the community in question is a major urban center with its enormous social and cultural variety, community standards cover a wide spectrum of sexual practices. It follows that it will also cover a wide spectrum of sexually oriented media. Even in a small rural community there is only moderate consensus in judgments (yes-no) of a series of pictures (Brown, et. al., 1978).

Nothing is going to change the range of lifestyles and sexual practices that flourish in the typical urban environment. Yet there is a criticism to be made of the concept of "community standards." It is a market or laissez-faire understanding of symbolic sexuality. This offends moralists who would prefer a less relative, less market-oriented and more absolute definition of sexual norms. From a feminist perspective it disguises the inequalities of power between men and women, and serves as a cover for real sexual oppression. According to this view, all men, even those who are well-adjusted, have hostile feelings toward women which can be activated by pornography. Under those conditions women can never be wholly consenting. Moreover, to the extent that men generally establish the standards of what is acceptable, "community standards" can be regarded as a sexist criterion.

4. Antipornography Social Movements. There is considerable literature in the social sciences on moral reform movements which indicates that efforts to control morality are part of a broader conservative political ideology, and this, in turn, is often combined with high scores on measures of an authoritarian personality. Leaders of these movements have been described as "moral entrepreneurs" (Becker, 1963).

"Decency crusades" have been studied with this general framework (Zurcher and Kirkpatrick, 1976; Wood and Hughes, n.d.). Feminists who are antipornography differentiate themselves from the more conservative element which is opposed to any form of social change including the sexual division of labour but at the level of rhetoric they often sound alike invoking apocalyptic imagery of impending moral decay.

To summarize, the studies of pornography suggest that the use of pornography has become widespread and that it stimulates sexual activity and sexual fantasy but does not alter established sexual practices.

In spite of the more permissive social environments of today, people are still ambivalent about pornography: they believe it is harmful to others, not themselves. Most of the research on pornography was carried out before the feminist movement developed its critique of pornography so it is not surprising that feminists who are critical of pornography are often confused with members of the older tradition of decency crusades.

IV

In general, those who study sexual offenders have not given any serious attention to the pornography either as a direct or indirect causal factor. Journalists frequently do, but criminologists and others who have studied sex offenses are more likely to emphasize early childhood experiences, weak social integration, cultural variables and other motivational and structural factors.

The pornography issue centers largely on rape. Theories about rape range from individual pathology or "deviance" to structural analyses which regard rape as a system of social control, a form of coercion which, like slavery, may be related to the modes of production.

Feminists have been critical of both extremes--the pathology approach and the materialist Marxist one. Instead the emphasis is on rape as a criminal offense but one which is nevertheless supported and encouraged by a variety of myths about the victims. Thus, almost any man, regardless of his personal history, is a potential participant in coercive sexuality, and, unless the coercion is of an extraordinary nature, he can count on a certain amount of public indifference and tolerance from the law enforcement system and the judiciary. As one writer put it, the association between sex and violence is so frequent in our cultural imagery that we can be described as a "rape culture because the image of heterosexual intercourse is based on a rape model of sexuality" (Herman, 1979, p. 43). The means of the coercion may be anything from the use of actual force to threats to use force to other

kinds of intimidation. Rape, then, has been redefined as an act of aggression intended to give the victim pain rather than pleasure in order to demonstrate and realize control.

Regardless of the theory about rape very little attention has been given to pornography. Goldstein and Kant (1973), however, did analyze all of the data available about the possible influence of pornography on sexual deviance. In addition, they carried out a study which looked at four matched groups: persons convicted of sexual offenses; persons known to be heavy users of pornography; persons who were either homosexuals and lesbians and also included transsexuals seeking sex change operations, and a control group.

The major finding was that sex offenders did not use pornography significantly more than the control group, but they used it differently: less in adolescence and more in adult years. But the most distinguishing characteristic of the sex-offender's use of pornography was that it activated sex-guilt. In short, the sex offender is a person who has problems with his sexual development which leads to an atypical use of pornography.

Since rape is a notoriously under reported offense there is a question about whether a population of convicted sex offenders provides the best data. These men may themselves be atypical--the ones who are unlucky or inept or self-destructive enough to be reported, charged and convicted. But is there a better method? Cross cultural or comparative studies are unsatisfactory but in different ways (McConahay and McConahay, 1977).

As things stand at present there is no systematic evidence to link either directly or indirectly the use of pornography (softcore or hardcore) with rape. There are many anecdotal accounts and a great deal of speculation; to many people it seems like such a plausible connection-- "pornography is the theory, rape is the practice"--that it is difficult to accept.

One reason is that pornography is a major source of myths about women's sexuality including the pleasure-pain relationship. Pornography is not the only or the most prestigious source of these myths, but it is a source which is cheap, easily accessible to the less educated and far more entertaining than textbooks in psychiatry and psychology which it popularizes.

For women the distortion and misrepresentation of their sexuality is part of a larger devaluation phenomenon which results in wage discrepancies, job discrimination, legal disadvantages, medical malpractice and other indices of being a "second sex". But although the myths about women and their sexuality are widespread, they are not necessarily held by men who either impulsively or systematically commit rape nor are they necessarily the key to rape. Rape myths may enter into the male chauvinist syndrome, but to the degree that the rapist is a person whose objective is to justify himself by forceful sexual abuse of women, to the degree that rape is an act of hatred the myth that women desire to be raped despite resistances the myths may be missing.

In the original aggression studies the stimuli were usually films or slides of men fighting men. Images of male against male are far more common in our popular culture than images of women fighting women or women and men fighting each other. More recently, however, psychologists have been looking at the symbolic presentations of sadistic sexual behaviour as a stimulus to aggression. Again these are experimental studies and many of the criticisms of this methodology discussed earlier apply. There is no reason, for example, to suppose that behaviour in a university psychology lab carries over to real life, or that the subjects (usually students in introductory psychology courses either at the University of Manitoba or the University of Wisconsin) are not wise to the game. Again, there are no controls for sex roles or for sex attitudes. Finally, the samples used are small and the studies are seldom replicated.

Despite these and other methodological drawbacks, the research raises important and new questions: does exposure to sadomasochistic pornography lead to sexual arousal? To hostile fantasies? To aggression against women? And does the sexual script itself influence the response?

These are all empirical questions and are not based on any particular theory. The closest there is to any theory is a version of behavioural modification. Malamuth and his associates (1980) cite as being analogous to their own research studies which alter the behaviour of

homosexual men by exposing them to heterosexual depictions of sexual behaviour which presumably lead to positive heterosexual fantasy and eventually heterosexual behaviour. But in general these studies tend to be untheoretical and to account for statistical relationships one by one.

The major finding of the studies is that men are not turned-on, not sexually aroused (based on measures of tumescence and their own word) by sadomasochistic depictions. The "sex revolution" notwithstanding, there are inhibitions that prevent the enjoyment of sexual cruelty even when it is so obviously make-believe.

Inhibitions, however, are part of our sex-role learning; they are not immutable, and there is always the possibility that in a sexually permissive society an individual may perceive these inhibitions as isolating him or her from the others. Thus, the next question is whether, and under what circumstances, these inhibitions could be weakened. And, indeed, much of the research could be characterized as the study of how to lower levels of inhibition.

In order to convey some notion of how these studies are conducted and how inferences are being made, I want to discuss in some detail two of them.

The first is an experiment by Donnerstein and Berkowitz which is a further extension of the latter's earlier aggression studies (1981). But instead of using Champion, they used a series of specially prepared five-minute films. Subjects were divided into two groups. One group was provoked by a female "confederate"; the other by a male "confederate".

After exposure to the films, the subjects were given an opportunity to retaliate by inflicting shocks on the confederate.

The findings indicated that male subjects inflicted more shocks on the female confederates than on the male one. And this differential has been taken to mean that there is a willingness, innate or socially learned, to hurt women over and above what could be said to be a legitimate response to a provocation.

But does it? What these studies show is that chivalry dies easily when self-esteem is challenged. Moreover, does it prove that men are hostile to women or that they are reluctant to inflict high levels of shocks on another male who might escalate the action by retaliating in some unexpected way? Still another explanation of the differential is that the responses have more to do with men's feelings of solidarity with each other than it does with their hostility toward women.

It is also worth noting that these studies cast serious doubt on the original Bandura hypothesis in which we would predict that after twenty or so years of watching TV where men are continually engaged in fights with other men, the male subjects would be more willing to hurt another man than they were to hurt a woman.

The second part of the experiment involved 80 undergraduate male subjects who were divided into four groups of 20 each. Each group saw a film. Two groups saw a film which depicted gang rape, but in one of them the victim, after an initial protest, came to enjoy the sexual aggression which is euphemistically called a "positive outcome." The

other group of 20 saw a film in which the victim was in some pain and not enjoying the rape--a "negative outcome." In this part of the experiment the confederates were only women. And the findings showed that subjects were more aggressive (more shocks administered) in response to the script in which the rape victim was enjoying the experience.

According to the authors their data support the view that normally men are inhibited from carrying out acts of rape, but if they can be persuaded that women enjoy it, their inhibitions dissolve and, in addition, they feel no responsibility for their obviously antisocial behaviour since they can attribute their behaviour to their victims. (This has come to be known as the "misattribution problem" or, as sociologists are more likely to say, "blaming the victim.")

But if rape is, as feminists have been contending, an act of aggression intended to inflict pain not pleasure then the findings of this research do not support their interpretation. What the findings suggest is that normal men are not so easily disinhibited, and that men inclined to rape are different. These studies establish again the deviant character of a rapist, but whereas in the earlier research the men were understood to have problems of sex-guilt, the new approach emphasizes the absence of inhibitions, too little rather than too much sex-guilt. Either way, they are different from the larger populations of men who may feel strong hostility toward women yet not carry it out. Public opinion may be changing concerning the rape myths (the feminist movement can take credit for this) but there is no evidence that the rapist ever had or needed these myths.

The second study by Malamuth and his associates (1980) looks at erotic arousal rather than aggression, and examines the responses of women to sadomasochistic stimuli as well as those of men. But, like Donnerstein and Berkowitz, Malamuth *et. al.* are interested in learning about the conditions under which we drop our defenses, stimuli that could weaken the normal inhibitory responses.

Instead of a five-minute film, they used a one-page story about a sexual encounter which was described differently. In one version, it is clearly rape; in another it was "mutually consenting" ("no reference was made to any force or resistance and the woman's reactions were described as being excited, feeling sensuousness, hungrily pulling him towards her, a sigh of pleasure and a frenzy of bliss." Italics in the original.)

Within the rape version, they introduced three endings: one in which the victim has an orgasm, another where she is clearly in pain, and a third where there was both orgasm and pain.

They too found that men are turned-off by depictions of rape, that sexual arousal measured either by self-reports or an apparatus attached to the penis is decreased by these depictions. Prurience seems to have its limits. However, in the small number of cases where there was evidence of sexual arousal, it was greatest in response to the story which combined pain and orgasm. For female subjects it was greatest for orgasm alone.

Again, it indicates that there are a small percentage of men who believe the testimony of some psychiatrists that pain and pleasure go together (Stoller, 1979). In any case, this study has been questioned on a number of grounds including ethical considerations (Sherif, 1980). As Sherif points out, the findings are so low that it is incorrect to say that the study demonstrates anything except the initial finding of aversion to depictions of rape in any form. She also challenges their interpretation of the differences between male and female responses. Not surprisingly, the female responses are low. Malamuth et. al. account for this by saying that the women in the study identify with the victim. In that case, Sheriff suggests, the men identify with the rapist. But that is not the interpretation given; Malamuth et. al. prefer almost anything else, she observes, but they settle on "false attribution" to account for the male response.

In a joint article reviewing the research, Donnerstein and Malamuth acknowledge that they are unsure themselves about how to interpret their positive (predicted) findings (1982). They speculate that in order to predict responses to pornography, they would need a complex model which at the present time they do not have.⁵ Susan Gray (1982) who reviewed the studies came to the conclusion that when all the studies were taken together they tell us about male anger rather than about pornography. They may also tell us something about male sexuality. For example, in a recent study the investigators set up an experiment in which they were looking at the responses to the quantity of pornography, comparing massive exposures to moderate and no exposures (Zillman and

and Bryant, 1980). And they found that subjects who received massive exposures were more hostile to women (attitudes, not behaviour--no shocks) than those who received moderate or none. But what is interesting about this study was that they did not use pornography. They showed their subjects films of noncoercive sexual acts.

If, as this study indicates, noncoercive sexual depictions can induce hostile attitudes toward women, the problem then is the state of mind: how men interpret their own sexual arousal and what it means to them. And do they project their own feelings to women? In any case, the degree to which we accept the findings of these and other studies depends on theories of rape, theories of sexuality, theories of the ease or difficulty in altering people's attitudes and behaviour by manipulating normal inhibitions.

Meanwhile, we have studies of sadomasochistic fantasy (McCormack, 1980) which suggest that bondage fantasies are not uncommon, and that many persons, male and female, find fantasies of this sort enhance sexual experience (Hariton, 1973). Freud regarded sadomasochistic fantasy as pathological, but contemporary psychiatrists (Stoller, 1979) and sexologists (Francoeur, 1977) are less critical. On the contrary, Friday (1973) regards the willingness of women to engage freely in bondage and other fantasies without guilt as a measure of liberation.

Putting aside what constitutes liberation and pseudo-liberation, what Friday and others are saying is that there has been a major change in our attitudes toward sexuality, and that unlike our predecessors, we

expect sexual activity to be pleasurable--if not for the other party, at least for ourselves--unspoiled by feelings of guilt. In this context, pornography and sexual fantasies, including bondage themes, enhance the mood. One wonders, however, whether some part of that mood enhancement is not related to the tabooed status of pornography and lingering guilt about sexual activity. In any case, pornography in this paradigm is neither cause nor effect; it is part of a sexual environment and it contributes to what Maslow calls "peak experience."

To summarize, the recent studies of pornography and aggression have shed little light on the effects of pornography, but have sensitized us to the deeper problems men have about aggression. They alter our perception of the type of person who would commit rape from a male whose sexual development has been disturbed leading to strong sense of self-hatred and sex-guilt, to a male who lacks the inhibitions that might deter him.

VI

Media research has, for the past forty years, been concerned with how much influence the media have on opinion, attitudes, and behaviour (Katz, 1980). Much of this research related to political phenomena: how did the media influence public opinion, political attitudes, voting and other forms of political participation. Consistently, the findings were contrary to the popular view of the media exerting a powerful influence, the image of "brain washing" (Katz, 1980). About all that could be claimed was that the media helped to set a public agenda, and even that was open to question.

Media research established a model of communication that was interactive rather than one-way from the media to the receiver. Audiences of all ages were not passive in this process, they were not sponges soaking up media messages; on the contrary, they were active: selective in their choices and selective in their interpretations of programmes, books, newspapers, and other media (Blumler and Katz, 1974). Thus, the real message of the medium was a joint outcome between sender and receivers, and, in order to understand this process attention had to be given to the public, the newspaper readers, TV audiences, library users, magazine subscribers and other.

Attention, then, was directed to the people who were consumers of the media: what sense did they make of what they were listening to, reading or seeing? And what was the process by means of which groups would arrive at a consensual agreement? The studies documented very clearly that the major influence the media have is to reinforce existing opinions, established attitudes and behaviour of individuals who are exposed. Only under the most exceptional circumstances do the media ever convert a person from one point of view to another. Thus, it is naive to expect that pornography could do more than generate interest in sexual activity and arouse some of the ambivalences a person may have about sexual activity. How people engage in sexual activity depends on a great many factors in the prior socialization process and in the social groups with whom the individual feels he or she belongs, their "reference group".

In recent years this interactional approach has been challenged by Marxists who regard it as too benign. The media, they argue, are part of a cultural hegemony which legitimates American imperialism in the Third World and capitalism in the rest of the world. Applying this reasoning here, the argument would be that pornography which may be acceptable in terms of community standards is, nevertheless, harmful to the weaker parties in a scenario of sexual conflict. Women and children become the victims in a symbolic environment which does not advocate their exploitation in any open way but, indirectly, legitimates it.

This type of argument has been used by those who oppose sex education in the schools. Even if the materials used do not advocate teenagers having sexual relations, they claim, the fact that it is discussed at all is enough to give young people the message that, it is within the range of allowable behaviour.

Liberal thinking on this has always stressed the educational value and the demystification process. But since it is not possible to test either of these hypotheses there is no evidence that the issue can be resolved through empirical research.

More amenable to testing are some of the hypotheses proposed by the late Marshall McLuhan who urged that we look at the medium rather than the content. But this implies that pornography is not in the content but in the style, and that the pornographic experience is a conjunction of the structure of the text and the cognitive predispositions

of the individual. The latter is, of course, much influenced by age and mental development.

To summarize, studies of media influence look at both the content and the audiences in a paradigm which emphasizes communication as an interactional process. Attention is given to the characteristics of audiences--age, socio-economic status, measures of social integration, and other variables that might predispose individuals or groups to experience the pornography differently. Thus, whether pornography was seen as amusing or disgusting, harmless or a danger to the moral fabric of society, a fantasy or a manual of instruction could not be predicted on the basis of content analysis.

Second, media influence, even when it is consistent with our values, tends to be weak. It would be good to persuade people to get cancer check-ups, for example; and messages of this sort would not meet with too much resistance in terms of our values of good health. Yet, even here, intensive campaigns rarely succeed in doing anything more than persuading people who were already on the way to the clinic that they were doing the right thing.

VII

Cultural analyses of pornography are diametrically opposite from the behavioural studies just discussed. For one thing, cultural studies are concerned with meaning rather than psychological or social effects.

For another, cultural discussions are concerned with values: how values are dialectically embedded in pornography and how values shape our responses to phenomena. Third, cultural studies assume that pornography, like any other text, has multiple meanings, and that the literal text which the psychological experiments regard as the only text may be the least significant. Finally, cultural studies regard pornography as a reflection of the culture, a mirror through which we can reconstruct the inner life of our own culture and of older ones; a symptom rather than a cause.

There is no consensus about what pornography means as a distinctive genre (the profane), how it differs from graffiti and other forms of profane. Nor is there any agreement about what it means philosophically or socially. Kaplan (1965) compared pornography to the black mass; Susan Sontag (1969) compared it to science fiction; McCormack to a Herman Kahn scenario; Marcus (1966) to a computer programme. Simone de Beauvoir, in her essay on de Sade, saw in his work the sensual converted into the authentic (1962). (Satre saw the same thing in the writings of Genet.) Both writers, Sartre and de Beauvoir, were making their own oblique comments on the intolerance of Gaullist France.

Other writers have addressed the political implications of pornography more directly. George Steiner (1967), for example, has suggested that pornography obliterates the line between private and public, and in doing so, creates a condition of total surveillance. By eliminating all forms of privacy, he argues, we eliminate the very experiences that give us our capacity to resist political manipulation.

Walter Berns (1971) similarly examines the relationship between pornography and politics. Pornography, he claims, turns us all into voyeurs. But to be a voyeur is to deny all shame, and shame, he postulates, is the foundation of humanness. Without this humanness there can be no civilized public life. Thus, censorship of pornography, he claims, is not in conflict with democracy; it is an essential precondition of it.

Clor (1969) is more liberal than either Steiner or Berns. Yet, he, too, sees a conflict between pornography and democracy. Democracy, he says, requires a rational, analytic citizen. The challenge to it, he suggests, is not shame but sensuality. Sensuality, he suggests, may be the key to a great artistic tradition, but not to political rationality.

There are still other cultural discussion, but those noted here convey some sense of how they differ from the behaviouralist studies.

VIII

What can we conclude about pornography and its social effects?

I have tried to indicate that there are a number of hidden scenarios that might not be apparent to anyone trying to make sense of this research. One is the controversy about psychoanalytic concepts vs. behaviouralism among psychologists many of whom accept neither. Among sociologists, there is the on-going debate on the nature of social deviance which is reflected in discussions about the rapist. Because of these hidden scenarios we very seldom have studies of pornography

as such; instead, we have experiments which use pornography as a stimulus. The cultural theorists have come closer to studying pornography as a phenomenon, but as I indicated, scholars in the humanities are not especially interested in the social or psychological effects of pornography.

In addition, I have tried to suggest that much of the research itself can be described as having a sexist bias. The failure to understand the importance of sex roles in the socialization process, the tendency to define male-initiated sexual activity as "mutually consenting" contributes to some of the reservations about the various empirical studies.

Bearing this in mind, we can summarize the research around certain issues:

1. Pornography and Rape.

Pornography is a major source of rape and other sexual myths. Although these same myths are found in more respectable literature, they are found most easily and by large numbers of people in pornography. The feminist movement has been a major source in challenging the myths about rape and female sexuality in general, but there is no reason to suppose that the rapist or potential rapist shares these myths. Studies of sex offenders provide no basis for establishing a connection between pornography and rape.

2. Pornography and sexual fantasy.

Explicit depictions of sexual activity, coercive or not, can induce states of sex arousal and sexual fantasies in both men and women. The fantasy may act as a substitute for an overt sexual act; it may act

as an enhancement of sexual activity; it may lead to sexual activity. All of these responses have been documented. Sexual fantasy, then, is a poor predictor of behaviour though the content of sexual fantasy may serve as a good diagnostic.

There is no systematic evidence that people copy what they see or read about in pornography. On the contrary, there is strong evidence that sex patterns, once established, are as difficult to change as any other social habits, and, in addition, there are strong inhibiting factors that intervene to keep our responses within the cultural norms. These norms are changing, and the changes may be very threatening to people who, for various reasons, would like them to remain as they were. There is a tendency to attribute changes in sexual mores to pornography, but it is more likely that as our sexual mores changed the use of pornography as mood enhancement became more widely acceptable as well. Similarly, the desensitization phenomenon, if it exists, may also reflect the reality of social change rather than social indifference.

3. Pornography, children and sex socialization.

Sexual behaviour is learned behaviour and develops over time corresponding roughly to stages of sexual development from infancy to old age. The process of learning includes not only a knowledge of what parts of the body can produce erotic pleasure, but sex-identity and sex-roles as well.

Media images, particularly with respect to sex-roles, may enter into the child's socialization and reinforce the parental models. But, Bandura notwithstanding, television and other media are unable to give

what real parents can: reward, approval, acceptance and reassurance about basic security. However, the real role models which children observe in their homes and on the streets may be aggressive and predisposed to violence.

Although young children have access to pornography, it means less to them than it does to their older siblings. Whether pornography does any harm to the adolescent boy or girl depends on: a) prior sex-education; b) sex-roles; and c) the availability of alternative imagery of sexual performance. The absence of alternative imagery probably deprives women more than men of a knowledge of their own sexuality.

Parents differ with respect to whether they wish to protect young children from erotic materials on the grounds of their immaturity or whether they see their responsibility as one of teaching children to live in a very diverse urban environment which includes pornography among other offenses to our values and taste.

4. Pornography and general social effects.

Although it is not possible to demonstrate a causal relationship between pornography and any specific outcome such as rape, it is possible to say that a cultural milieu in which women are always perceived as sex objects contributes to the devaluation of women. Goals such as greater participation in public life, equal pay for work of equal value, daycare, etc. are that much more difficult to achieve without the strong positive images that establish credibility. Pornography demeans men as well as women, but men have so many more positive images that they are not disadvantaged by it.

In reviewing the literature I have not tried to discuss some of the other questions about pornography--whether more is available today and whether what is available is super hardcore; how other societies handle sexual obscenity; and, above all, what our responses should be to it in a free society. It is hoped, however, that research will have a bearing on policy questions.

Notes

1. Among the historical studies are D. F. Foxon, Libertine Literature in England 1660-1745. New York: University Books. Montgomery Hyde, A History of Pornography. London: Heinemann; Roger Thompson, Unfit for Modest Ears. London: Macmillan, 1979.
2. See Abraham Kaplan, "Obscenity as an Esthetic Category," Law and Contemporary Problems 20, No. 4: 544-559. Steven Marcus, The Other Victorians. New York: Basic, 1966. Susan Sontag, "The Pornographic Imagination," in Styles of Radical Will, New York: Farrar, Straus & Giroux, 35-73.
3. D. H. Lawrence, Pornography and So On. London: Faber & Faber, 1936. Simone de Beauvoir, The Marquis de Sade. London: Calder, 1962. Sir Herbert Read, "Does Pornography Matter?" in C. H. Rolph (ed.) Does Pornography Matter?. London: Routledge & Kegan Paul. George Steiner, "Night Words" in Language and Silence. New York: Atheneum, 1967. Walter Berns, "Pornography vs. Democracy--A Case for Censorship", The Public Interest, 22: 3-24.
4. Alarming statistics are often given of how many hours children watch television and how many incidents of violent crime they see in an average week. Appeals are made to our common sense that suggests that children will be strongly influenced by this viewing experience. But children themselves may not always rate programmes by their violence. In a study conducted by the BBC families were invited to the studio and after dinner they were shown a particularly violent film. After viewing the film, they were encouraged to talk about it.

Contrary to expectation, they seldom mentioned the violence (Shaw, et. al., 1972). One criticism of the social learning studies is that the investigators interpret programme content through their own eyes and not those of children (Himmelweit, 1958). Bruno Bettelheim in his study of children's fairy tales (1976) argues that children need the fantasies of violence as part of their emotional growth. One might consider that the bondage fantasies of pornography begin in classical fairy tales and touch on a child's own bondage experience as a child who can be punished and learn to love the punisher. In addition, the Bandura studies have been criticized for assuming that the subject, child or adult, is a blank. On the contrary, it is almost axiomatic to say that the attitudinal effects which any programme has on persons is largely dependent on the social and psychological predispositions brought to an interactional communicative act. Many persons have made this point, but the most recent is Dorr (1980). Black children, for example, do not respond the same as white ones (Greenberg, 1972), nor do boys and girls react the same way (Cantor and Orwant, 1980). Furthermore context may influence what children chose to see or not to see (McCormack, 1962). But, perhaps, the most important criticism of these studies comes from contemporary developmental theory which examines the growth of thinking, information processing and conceptual development. As children develop, their critical skills are more developed and they are more aware of the difference between fantasy and reality, between themselves and what the TV people are trying to

do to them. Thus the long term process is not reinforcement of childhood experience with television images. Rather it is toward greater detachment (Noble, 1970; Kelley and Gradner, 1981).

5. The mindlessness of this research is illustrated by the following. It is customary after these experimental studies which use so much deception to "debrief" the subjects to tell them, as in this case, that it is just not true that women enjoy being raped.

The findings of these studies consistently show that the overall impact of research participation (including the debriefings) is to reduce subjects' acceptance of rape myths. While the data indicate that the information contained within the debriefings may be sufficient for some attitude change, the combination of exposure to violent pornography that portrays rape myths appears to be most effective in reducing rape myth acceptance. However, as an afterthought they do not recommend it. Knowledge that a debriefing may result in the total research experience having a beneficial impact is likely to encourage future work in this area. These data, however, should not be taken as a carte blanche to justify any pornography exposure-debriefing procedures.

(Donnerstein and Malamuth, 1982, p. 129)

F

SO WHERE IS ALL THAT PORN?

(BRYAN JOHNSON, GLOBE & MAIL, APR. 28 /84)

PORNOGRAPHY and videotapes are such hot issues at Queen's Park these days that dissenters from the "correct" political line have been forced underground — revealing their true opinion only if they are not identified.

"My own personal feeling is that it's best to let the Criminal Code deal with obscenity," shrugs one Liberal MPP, whose party has gone even beyond the Tory Government in its demands for strict censorship. "But you can't say that publicly right now. The whole political climate is very much in favor of censorship... partly because of the general confusion and hysteria surrounding the subject."

Confusion? What confusion? Ontario Culture Minister Susan Fish betrays no uncertainty in declaring that "everything from so-called snuff movies to very, very serious exploitation of women and children" is available in the province's video stores. She concedes that she's never tried to find such films, but has a definite "impression that they are available".

MPP Don Boudria (the Liberal member for Prescott) is even more sure of his information. "Of course" pornography is readily available at many video stores, he says flatly. As for such law-enforcement agencies as Project P, the crack police porno squad which has confiscated thousands of videotapes: "They do good work, but that's only the Toronto police. I've seen their (porno film) presentation and it was sickening. But they only exist here in the few square miles of Metro. The rest of the province is wide-open."

Such strong opinions came percolating to the surface in the provincial throne speech last month, when the Tories announced they will make changes to "provide reasonable and clear-cut protection against exploitive film and video productions". The precise scope of the shift is still secret, but most insiders believe it will extend the powers of the Ontario Censor Board — a body placed in legal limbo by recent court rulings that it violates the Constitution.

There is no doubt that new video controls would be a politically astute move. Various lobby groups have placed pornography near the top of any "women's issue" list, and polls indicate most Ontarians favor the cutting and prohibition of some films.

"Politically," says the anonymous Liberal member, "it has become a motherhood issue. It's hard to have a rational discussion about it, because everybody is so emotional. Whatever the actual truth, most people have the impression that there is a wave of uncontrolled pornography out there. They want it stopped, and they are not inclined to listen to anyone's arguments about civil liberties."

Those arguments have, of course, been eloquently expressed by people such as Alan Borovoy. The general counsel of the Canadian Civil Liberties Association concedes that "vile garbage" is circulated in this country but says that is *not* the issue which divides him from the pro-censorship forces.

He believes the real question "is whether prior censorship is an appropriate response. I feel it is a particularly pernicious encroachment on freedom of expression. To whatever extent there is an argument for legal limits on free expression, they ought only to be applied *after* the fact... after the communication takes place."

"That is how we handle national security, after all. We don't force The Globe and Mail, or magazine and book publishers, to vet their material before it is presented. We use subsequent prosecution. So what is this peculiar set of priorities in our society, that 'community standards' should be given this extreme protection?"

Such theoretical debate, however, sounds weak-kneed and permissive to those convinced we are awash in a wave of violent pornography. And it means even less to the police, who deal with video trash strictly according to Ontario court guidelines. At this precise moment, the province considers obscene "any form of penetration, sexual act combined with violence, with children, or with animals," according to Project P's Constable Gordon Montgomery. Any such tapes found in a video store will immediately be confiscated and brought to court.

Nothing else surrounding video porn, however, is quite that simple. The issue is so complex that even Ontario legislators are making judgments based on erroneous impressions.

Mr. Boudria's conception of Project P, for example, is completely

off base. The pornography squad is a joint effort of Metro and OPP units, whose authority and expertise cover the entire province. The officers lecture at all police colleges, instruct local police in the intricate obscenity laws, and are instantly available to help any police unit in Ontario evaluate obscene material and lay charges.

That may be, says George Hutchison, press secretary to Liberal Opposition leader David Peterson, but it doesn't solve the problem. He justifies censorship on the grounds that police "have difficulty in registering convictions, because of the vague nature of the Criminal Code language".

"I can't remember the last time we lost a case," chuckles the unit's Cpl. Ron Kirkpatrick. "I've been here for two years and we've never lost one in that time." Indeed, since its formation in 1975, the anti-porn squad has gained convictions in 99 per cent of more than 400 charges. Last year alone, the group seized roughly 1,500 videotapes covering about 300 titles, and laid 119 separate charges.

And what about those "snuff" films and child pornography which Culture Minister Susan Fish and many others cite as the strongest justification for censorship? Well, despite headlines like Snuff Film A Hit With The Children (which appeared last week in this newspaper) police experts say this ultra-violent genre owes more to myth than reality. They also insist that child porn is an underground specialty which would remain unaffected by any crackdown on video stores.

The plain fact is that so-called "snuff" movies — in which actors are seemingly brutalized and killed — exist in Canada only as rumors. The grisly simulations which have emerged from South America have been seized and taken to court. And films like Snuff and I Spit On Your Grave are now routinely confiscated.

ed and prosecuted whenever they are found.

"We've never seen a *real* snuff film at Project P," explains Cpl. Kirkpatrick. "Some of them look real, but when you examine them closely and see all the mistakes they make, you know it's not a real kill. The Americans say they've had them down there, but we've never seen one. . . or seized one in Canada."

Child pornography is definitely not a myth, and is often featured prominently in "out-take" films used to alert citizens' groups to pornography. Yet sex films involving children have *never* been found among the thousands of tapes confiscated from video stores.

"All we've ever seized are a couple of home-made films from pedophiles," says the police pornography specialist. "There is a lot of kiddie porn around, but that kind of stuff is strictly underground. . . it's distributed in correspondence among pedophiles. The only way we could get at it would be to infiltrate the ring, or catch someone in the act of making it. But that has nothing to do with video stores. If you ever went into a (video) store and asked for it, you'd probably get both your eyes blackened."

The wide publicity surrounding child pornography, say the Project P experts, is a product of society's

deep abhorrence of child abuse — not a reflection of its easy availability. And though police are careful to take no sides in the censorship debate, they do note that conviction is already automatic for those distributing such hard-core items as "snuff" and child porn.

"That kind of stuff hardly ever goes to trial," says Cpl. Kirkpatrick. "There's no use defending it, so they just plead guilty."

This is not to suggest that hard-core pornography has become non-existent in Ontario's video stores. If it were not there, obviously, Project P would not be seizing tapes and laying charges with its current regularity. The point is that any obscene tapes being sold and rented are strictly illegal and are already closely scrutinized — without the help of the Ontario Censor Board.

"We're investigating all the time, ourselves," says the pornography unit's Constable Montgomery, "and we check out any complaints we get from citizens who think a store is dealing in pornography. Anything that comes to our attention, we're going to take action right away. If it violates (the court guidelines) . . . we confiscate it and lay charges."

That method of control — the tough enforcement of the Criminal Code — is the one favored by the provincial New Democratic Party for *all* films, including those shown

in theatres. NDP leader Bob Rae does not discount the danger of pornography. Indeed, he admits his party "has been forced to do a lot of soul-searching in the past couple of years. The women's movement has made us reassess our perceptions. . . about violent pornography. You have to face the fact that there is material out there that is very harmful. And society can only be immune to that for so long."

But Mr. Rae considers the censor board a threat to civil liberties, privacy and freedom of expression. And he is sharply critical of the board's frequent showings of pornographic "out-takes" to shock legislators, journalists and citizens' groups into supporting the idea of censorship.

"Yes, that stuff is awful," he concedes. "Yes, it is terrible. But it also is not being shown in Ontario. . . not legally. It is covered by the Criminal Code. That's why we want to see the Code used as the basis for testing obscenity. It's a question of due process, of having the right of appeal. The role of the censor should be limited to classifying, rather than snipping and clipping."

Those who favor censorship oppose the NDP solution on the grounds that it would be too permissive — that it would, as Tory spokesperson Susan Fish puts it, "touch only on a few of the most extreme cases". The Cabinet minister says strict law enforcement may sound good in theory but, in practice, "very few seem to be prosecuted. That would seem to leave quite a few out there. . . and that worries me."

This argument, however, quickly evolves into a chicken-and-egg situation. Opponents of censorship cite the censors themselves as the main reason so few film distributors are prosecuted. Instead of rooting out the pornographers, argues Algoma MPP Bud Wildman, the film-snippers actually *protect* them from the law.

"That's one of the problems we have in Ontario," says the NDP legislator. "When Mary Brown and her censors cut films, they are often removing the very portion which might offend the Criminal Code. So, in essence, they are protecting the producers of this kind of material from prosecution." He notes that Project P now gets convictions against videotape, not film, distributors. "And if the Tories decide to extend the censor's jurisdiction to tapes. . . those convictions will stop, too. That doesn't strike me as very helpful."

But the NDP position carries little weight at Queen's Park, where the ruling Tories and opposition Liberals have reached the opposite conclusion. Each has dismissed the enforcement option in favor of the censor board — a position which remains unshaken by the Ontario Court of Appeal's recent ruling against the board. Meanwhile, the censors continue to function normally while the case is before the Supreme Court of Canada. And even if the ruling is upheld, the province seems certain to re-establish the board under a set of guidelines which would meet the legal objections.

Such a move would encounter non-flak from the Liberals, who are so strongly wedded to censorship that David Peterson accused the Tories of having "stolen. . . our policy" when the throne speech promised a video crackdown. In fact, Mr. Peterson unveiled in February his own set of drastic new proposals to make "crime, horror, cruelty or violence" legally obscene — whether or not they were combined with sex. His suggested changes to the Criminal Code would proscribe those elements even if they were not the "dominant" characteristics of any film.

"David has argued that a committee of the Legislature should sit and draft community standards for the use of the censor board," explains the Liberal leader's press aide, George Hutchison. "He feels that it's the responsibility of elected officials to take on that task. . . and not leave it to bureaucrats who are not accountable."

The Tory Government has not even expressed that small reservation over the current system. And its contentment can only be increased by Government-sponsored polls which seem to show wide support for the status quo.

A close look at the most recent official survey, however, reveals a built-in bias which virtually guarantees the strong approval of censorship. The wide-ranging opinion poll, titled Ontario Consumer Issues 1983, asked 900 respondents if they felt there should be "some controls" over film content. It also mentioned the censor board, and asked whether such a board should cut or prohibit films "which it thinks would be very objectionable to a large majority of the people".

No other method of controlling pornography was included among

the questions, creating an obvious link between "some control" and the censors. Not surprisingly, results showed a strong correlation between those who wanted control (71 per cent) in movie theatres, and those willing (62 per cent) to let a board cut and prohibit films.

Might the numbers have been different if the questions had included other options? "That's an interesting point," agrees Rudy Wall, the poll's project director at the Ministry of Consumer and Commercial Relations. "I guess your criticism has some merit. But it was never our intent to see if the public favored enforcing the Criminal Code, since we're not the body which decides on that. We have the theatres branch (under the Consumer ministry), and we wanted to see how we should plan that program.

"We just wanted to find out if the censor board was supportable."

No such disclaimer, however, is attached to the consumer survey. So the numbers now stand as evidence that Ontarians *do* back the censors. Yet, even with the carefully-calculated questions, the poll showed surprisingly modest support for restrictions on videotapes.

Fully 84 per cent of those surveyed wanted "some controls" over television, and 71 per cent over movie theatres. When the same question was asked about home video, however, only half the respondents were in favor. Even at that, the poll said the heaviest demand for controls came from "women, those over 45, and people with less advanced educations" — a group also identified as the least likely to own or watch a videotape recorder.

"That's true," concedes Mr. Wall. "Support for control is not as strong among the heaviest users of VCRs. . . But that doesn't disqualify the others. On important issues like these, everyone has a right to express their opinion."

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people. That is what our politicians have not discussed with us, and what lies hidden behind the screen of political rhetoric and the smile of a popular President.

What follows is a chronicle of that campaign, told simply by means of recounting the deeds that comprise it. This chronicle is not the secret history of an alleged secret plot. Most of the events have been duly reported in the daily newspapers. The chronicle is simply a matter of paying attention to public deeds that have been largely ignored or made light of outside the confines of congressional hearings. The chronicle is remorseless because the campaign is remorseless, and it is shocking because the campaign is shocking. When a concerted assault on the habits of freedom ceases to shock us, there will be no further need to assault them, for they will have been uprooted once and for all.

I. 1981

The newly elected Reagan Administration promised to "hit the ground running" and it does—like a company of commandos fanning out in a hostile country that just happens to be its own.

What it besieges at once is the old, unsung bulwark against overweening presidential power: the open, garrulous, decentralized executive branch itself. Bureaucrats practiced in rudeness and evasion are put in place of helpful press officers. Telephone requests for information are suddenly given short shrift. Press briefings become so grudging, notes one veteran reporter, that a State Department spokesman says "no comment" and "I can't say" more than thirty times in the course of one forty-five-minute session. Pentagon officials are warned that the polygraph test—which accuses the guilty and the innocent alike—will be used to identify those who "leak" classified information to the press.

In late April the President declares a moratorium on the preparation and dissemination of government publications, and the huge, habitual outflow of official reports, bulletins, and pamphlets is quickly brought under control. The Administration's stated goal is the "elimination of wasteful spending on government periodicals." Dropped in the moratorium is a government booklet on bedbugs, which Edwin Meese III, counselor to the President, brandishes for reporters with a hearty chuckle, as well as Central Intelligence Agency reports on "U.S.-Soviet Military Dollar-Cost Comparisons," which disappear unbranded. Meanwhile, the White House musters every specious argument it can find to justify the biggest arms buildup in history. Something considerably more important than thrift lies behind this moratorium.

Whatever can be hidden the Administration hides. "The White House is structuring key advisory panels," reports the *New York Times* in July, "so that they do not fall under the public meeting rules of the Advisory Committee Act." Under the direction of the White House the agencies of the executive branch evade the public accountability provisions of the Administrative Procedure Act. New regulations are issued as "guidelines" so that the public need not be notified. Existing regulations are altered by internal memorandums.

On June 6 the *Washington Post* runs a story under the headline "Administration Attempting to Stem Information Flow to Trickle." This is only the beginning, however, for the President is determined to redress the balance between, in his words, "the media's right to know and the government's right to confidentiality."

This latter "right" is a figment of the official imagination: in America the governed have rights, not the government. But one reason the Administration is determined to uphold it becomes clear on July 8 when a legal analysis of the gravest importance begins circulating in the House Committee on Energy and Commerce. Prepared for the committee by the



American Law Division of the Library of Congress, it describes a far-reaching seizure of power carried out by the President on February 17 when he signed Executive Order 12291. That order, says the report, "sets up a framework for [presidential] management of the rule-making process that is undeniably unprecedented in scope and substance," one that "does not appear to draw its authority from any specific congressional enactment." It "provides no explicit safeguards to protect the integrity of the process or the interest of the public against secret, undisclosed, and unreviewable contacts . . . the Order, on its face, deprives participants of essential elements of fair treatment required by due process." Most important, the order threatens to make "cost-benefit principles," imposed and manipulated by the White House, supreme over the statutory mission given by Congress to the executive agencies of the government—in violation of the doctrine of separation of powers. The warning falls into the public arena as noiselessly as a feather.

The Administration's most ambitious efforts to censor and suppress lie in the future, but even in mid-1981 it begins to choke off various sources of objectionable opinions.

Cuba is one such source. On July 10 the secretary of the Treasury notifies 30,000 subscribers of the Communist Party weekly *Granma*, which was impounded by Treasury agents in May, that "it will be necessary for you to obtain a specific import license from this office" in order to "import" Cuban periodicals in the future. The maximum penalty for subscribing without a license is ten years in prison and a \$10,000 fine under the Trading With the Enemy Act of 1917; this act has never before been applied to periodicals, owing to the longstanding national "habit" of distinguishing printed matter from merchandise. By treating Cuban periodicals like Cuban cigars the Administration claims control over a hitherto free activity—until it is stopped by a First Amendment lawsuit brought by the ACLU. This is not the last time, however, that the Administration will try to use commercial regulations to suppress non-commercial activity.

Political refugees from friendly tyrannies are another source of objectionable opinions: they know too much about the regimes they fled. After seeing its February white paper on El Salvador, which presented "evidence" that the Salvadoran guerrillas were being heavily armed by Cuba and the Soviet Union, exposed as a pack of lies, the Administration begins to deport Salvadorans en masse. In August, the tortured corpse of one deportee turns up by a Salvadoran roadside.

To the Administration, however, the most dangerous source of objectionable opinions are its own documents. On October 15 the White House submits legislation to Congress that would keep these documents out of the public's hands by "reforming" the Freedom of Information Act into oblivion. Politically, this is the Administration's first truly perilous moment, for the act is no ordinary piece of legislation. It has behind it the entire weight and authority of the democratic tradition in America: the sovereignty of the people, the accountability of government, the old republican distrust of official secrecy and bureaucratic caprice. "The Freedom of Information Act is a blessing for those who value a check on Government snooping," William Safire, the conservative columnist for the *Times*, wrote in May when the White House, testing the waters, first indicated its hostility to the law. "Individuals can now find out what the FBI file says about them. Even better, individuals can force the Federal bureaucracy to disgorge rulings made without public scrutiny, and documents more politically embarrassing than secret."

Yet one "improvement" in the Administration's Freedom of Information Improvement Act of 1981 would put out of the public's reach precisely those documents that give the governed their "check on government snooping." Another "improvement" would make it difficult to discover how the agencies of the executive branch are enforcing the health, safety, and environmental laws that the White House is bent on subjecting to

By treating Cuban periodicals like Cuban cigars the Administration claims control over a hitherto free activity

'Freedom of information is not cost-free,' explains one Administration official. 'It is not an absolute good'

cost-benefit analysis. A third improvement would make it dauntingly expensive for the act to be used by those who inform the public—scholars, writers, newspaper reporters, public-interest organizations—the very users that, under the unimproved act, pay little or nothing.

"Freedom of information is not cost-free. It is not an absolute good," Jonathan C. Rose, an assistant attorney general in charge of abridging the freedom of information, would say a year later. But the Administration's cant about thrift rings false. "If the Freedom of Information Act is rescinded or crippled," says Kurt Vonnegut at a symposium on the FOIA, "the American people will have been treated as spies for a foreign enemy." An Administration which prates about getting the government off the backs of the people has revealed its real ambition: to get the people off the back of the government.

On October 14 that ambition could scarcely be plainer, as the President invokes "executive privilege" to withhold from Congress thirty-one documents, many of them unsigned memorandums, prepared by junior officials in the Department of Interior. In the most sweeping assertion of executive secrecy in our history, the President declares that all information that is "part of the executive branch deliberative process" lies beyond the oversight of Congress. President Reagan, who invents his own constitution as he goes along, has expanded the confidentiality of the Oval Office to cloak the entire executive branch. In the space of twenty-four hours he has proposed to cut off the government not only from the people, but from their elected representatives as well.

By October 15 Congress has every reason to ask—and loudly—on what meat doth this our Caesar feed. But Congress asks nothing. The opposition leaders are silent; "liberals" are as mute as "conservatives." The elected representatives of the people apparently prefer to deal privately with the White House rather than awaken the sleeping electorate. Quietly, Congress will preserve the Freedom of Information Act, and quietly it will challenge "executive privilege"; but the Administration's assault on accountability it will not make known to the people.*

On December 4 the President signs an executive order authorizing the CIA for the first time to collect "foreign intelligence" in the United States by surreptitiously questioning the citizenry. It also authorizes the CIA to employ the entire local police force of the country in this undercover questioning, which can take place in a barroom, a barbershop, or the aisle of a K-Mart—as if the U.S. government needed to monitor the unguarded conversations of private citizens to keep itself informed about foreign countries. Getting the government off the backs of the people is the very last thing this Administration wants.

O

II. 1982

n January 7, at the annual meeting of the American Association for the Advancement of Science in Washington, the Administration opens an assault on the old, slack habits of scientific freedom. The "hemorrhage of the country's technology" overseas is so severe, says Admiral Bobby Inman, deputy director of central intelligence, that the government must step in to "control" the public dissemination of private research. If the nation's scientists do not submit voluntarily to such censorship, Admiral Inman warns the assembled audience, a "tidal wave" of public outrage "could well cause the federal government to overreact" against the liberties of science. Anger and indignation sweep the meeting. What the government wants "is clearly more compatible with a dictatorship than a democ-

*The Administration's FOIA bill never came to a vote. Other legislation incorporating many of the Administration's proposals passed in the Senate, but stalled in the House. In late 1981, the House Committee on Energy and Commerce cited Interior Secretary James Watt for contempt; the documents at issue were subsequently turned over.

G

Police say censors' guidelines Feb 8/85 will not keep out pornography

By STEPHEN BRUNT

The Ontario Film Review Board's new power to censor videotapes will make life easier for dealers, but police admit that it will do little to stem the flow of hardcore pornography.

Under the Theatres Amendments Act, which went into effect Monday, the board has the power to ban, cut, and rate videos for the home market. By September, distributors and retailers — who will be licenced — will only be able to handle tapes bearing the board's seal of approval.

But because almost all hardcore pornographic material is now sold under the counter, or from other provinces through courier services, it will never reach the censors' screening rooms.

"Hardcore will always be there anyway. That will never stop," says Constable Don Richardson of Project-P, the joint Metro-Ontario Provincial Police anti-pornography unit. "If an adult wants to get any type of material and use it in their home, they would probably be able to."

In the past, video dealers have resorted to self-censorship to avoid prosecution under the obscenity laws in the Criminal Code. Distributors monitor recent court rulings, often edit tapes accordingly, and advise dealers which tapes have been approved by the courts. In most cases, the tapes sold openly in video stores fall within the limits of the Criminal Code.

The board's guidelines are said to be tighter than the Criminal Code, though there is much

discretion allowed in enforcing them. But unless the board becomes much stricter than it has been in censoring films for theatres, the only tapes which will actually be cut or pulled from video store shelves will be those that fall somewhere between the Criminal Code and the censors' guidelines.

Those tapes are regarded as soft-core pornography — simulated sex with no scenes of penetration and no erect penises.

Dealers will now have more guidance in what they are allowed to sell than they did when operating under the unpredictable federal laws. But there is still no assurance that tapes approved by the board will be immune from criminal action. (On at least one occasion, the videotape of a film approved by the censors for screening in theatres was the subject of obscenity charges laid against a video dealer).

"They've passed some stuff that's been questionable," Constable Richardson says.

Meanwhile, anyone interested in obtaining hardcore sex tapes can smuggle them across the border, obtain copies from those who already own them, or look at the classified sections of newspapers. Video outlets in British Columbia and Quebec, where obscenity laws are enforced less stringently, openly advertise the sale of uncut, U.S.-made pornographic tapes.

Because they do not cross international borders, the tapes are not subject to Canada Customs restrictions; because they are shipped via courier, the video dealers are not open to charges of sending obscene material through the mail.

Constable Richardson says that Project-P is concerned about tapes shipped into the province by couriers, but isn't sure how to combat the problem. There is some question as to whether courier services can be held responsible for distributing obscene material when their only function is to transport an unmarked package from one place to another. That issue will probably eventually be decided by the courts.

Once the tapes are delivered in Ontario, there is little police can do. Possession of obscene material is not against the law. Unless the person who buys the tape attempts to sell it, rent it, or screen it publicly, he cannot be charged.



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H

Who censors imported books and magazines, anyway?

Lots of people, that's who. Bureaucrats, the police, even volunteers!

No single group with clearly defined guidelines and undisputed constitutional powers has been given the mandate to decide what can and cannot be imported and sold at Canadian newsstands. Instead, foreign publishers must steer their products through a maze of regulations and litmus tests for obscenity. The situation is different in each province or territory, but let's look at Ontario as a case study.

Say you'd just published a magazine of dubious literary value (wink, wink; nudge, nudge) and wanted to sell it in Ontario. Here are the hurdles you must clear.

Canada Customs 1

Although the Customs branch of Revenue Canada is generally responsible for collecting duty and taxes on items brought into the country, each Customs officer at the border and at every international airport also has the power to examine your reading material, declare it obscene and seize it. Decisions are based on a well guarded list of the types of material which would be considered "hate propaganda," "treasonable," "seditious" or "obscene."

Foreign publishers generally submit pre-publication versions of their magazines to the Prohibited Importations Unit of Canada Customs in Ottawa. The Unit "advises" the publisher of the areas which would, in their opinion, contravene the guidelines and result in the magazine being turned away at the border. The guideline which is most often used to censor gay male erotica prohibits the depiction of sodomy, which was decriminalized in 1969 if "committed" in private between two consenting adults. But — can you guess? — if there's a photographer present (not to mention the reader), then the act is apparently no longer taking place in private. And that's

against the law, so it's banned. The Prohibited Importations Unit advises the publisher which areas are objectionable and the publisher uses black dots to strike out the offending activity. Separate Canadian black-dot editions are then added to the end of the regular press run.

And then the magazines are clear to enter Canada, right? Wrong.

Canada Customs 2

Those individual Customs officers stand on guard for thee and have the right to seize material which in their opinion is offensive, treasonable, seditious, or hate propaganda, regardless of the advice the publisher may have received from the Prohibited Importations Unit. This power to use their own discretion means that some items are banned in only certain parts of the country. A recent edition of the US gay newsmagazine, *The Advocate*, was banned in British Columbia because an inspector there objected to the classifieds; yet the same issue was approved virtually everywhere else.

Ontario Advisory Committee on Contemporary Literature

Once your masterpiece makes it through the Canada Customs regulations, it has community standards to contend with. "Which community?" you ask, "Whose standards?"

In theory, that's the business of the courts. In practice, it is the police who in most instances make these determinations. They have only to frown and your publication is whisked off the shelves by retailers who believe they have no interest in defending their customers' freedoms in court. But just to make sure that even those unwelcome frowns are few — a hardy lot, these publishing types — Ontario's book and magazine distribution industry has created the Ontario Advisory Committee on Contemporary Literature.

The committee, composed of three paid consultants with the right academic stuff, reviews your magazine and "suggests" — no one ever censors, have you noticed? — which pages should be ripped out by the distributor.

The Police

The men and women in blue can seize material from the newsstands, even after all the previous examinations. This is the most visible form of censorship and the least elegant. The publicity resulting from a seizure usually means an increase in sales in areas where there have been no seizures. In Toronto, the Ontario Provincial Police and the Metro Toronto Police jointly operate Project P, under the orders of the Ontario attorney-general. It often reviews decisions made by the Ontario Advisory Committee on Contemporary Literature, and is the police agency which lays criminal charges against any offending material which has escaped the scissor's gauntlet.

Canada Post

The Post Office has the power to censor or seize mail which the Minister of Consumer and Corporate Affairs finds to be "obscene, indecent, immoral or scurrilous." So much for your subscription copies.

Municipalities

The provincial government has authorized municipalities to oversee the "licensing, regulating, classifying and inspecting" of adult entertainment parlours. Never heard of one? An adult entertainment parlour is defined as any place which provides "goods or services appealing to erotic or sexual appetites or inclinations." Sound like your local shopping mall?

As you can see, censorship in Ontario is no more than the whims of a number of individuals in positions of power. And you know how enlightened some of those people can be.

AO●

Secondly, the petitioners submit that grandfathering results in discrimination on grounds of age and sex, both of which are proscribed grounds of discrimination under s.15(1). The facts relied upon to support this argument are that new practitioners (particularly recent medical school graduates) tend to be younger than established practitioners and that a higher proportion of the former than of the latter are women. These concerns might justify legislated affirmative action provisions of the type contemplated by s.15(2) of the Charter. But they are not of such a kind as to warrant striking down these neutrally framed enactments on the basis of adverse effect discrimination. Demographic differences between a grandfathered and non-grandfathered group on one or another of the nine grounds listed in s.15(1) would seem to be inevitable. To state the same point in a different way, it is difficult to envisage any system of grandfathering surviving constitutional challenge if a condition of doing so is showing that the demographic make-up of the two groups is identical. I conclude that the submission alleging discrimination on grounds of age or sex cannot succeed. The substantial question, to which I now return, is whether statutory grandfather provisions, as such, violate the right to equality guaranteed by the Charter.

In the present case differentiation for purposes of grandfathering is based on employment history. This raises a preliminary or "threshold" issue as to whether differential treatment on a ground not listed or similar to one listed in s.15(1) can constitute "discrimination" within the scope of that Charter provision. If not, that is the end of the inquiry. If it can, the second broad issue to be confronted is whether the impugned enactments do in fact discriminate according to the test(s) to be applied in construing the equality right guaranteed by s.15(1) and s.1 of the Charter.

Canada. REPORT OF THE SPECIAL COMMITTEE ON
PORNOGRAPHY AND PROSTITUTION (THE FRASER
COMMITTEE). 1985.

Section IV

Recommendations on Pornography

Chapter 20

The Criminal Code

1. Introduction

In making recommendations about changes in the *Criminal Code* we have drawn together all of the components of the work we have undertaken on pornography. Thus our recommendations flow from the guiding principles which we set forth in Part I, and are reflective of the current situation with respect to the availability and use of pornographic material, the harms which we feel are associated with this material and our views on the proper role of the criminal law in the area.

As we pointed out in Part I, Chapter 2 of the report, the traditional liberal view of the power of the state to limit the freedom of an individual is that the state can only act when the exercise of that person's freedom results in direct, demonstrable harm to others. By contrast the conservative view is that it is legitimate for the state to intervene to prohibit conduct in order to protect and affirm traditional moral values, even if there is no proven harm caused by the conduct to others. Mainline feminist opinion takes the middle ground that the state is justified in curbing the freedom of an individual where his conduct, while not necessarily causative of direct, demonstrable harm to others and regardless of whether or not it offends traditional moral values, does or threatens social harm in the sense that it undermines or subverts important social values and policies. In particular feminists see the equality of the sexes in political, economic, and social matters as so fundamental to the life and fabric of this country that action by the state both to promote and protect it are entirely warranted.

In our recommendations on changes to the *Criminal Code* relating to adult pornography we have applied a definition of harm which embraces not only direct, demonstrable harm to an individual, but also an element of social harm. In essence we see two forms of harm flowing from pornography. The first is the offence which it does to members of the public who are involuntarily subjected to it. The second is the broader social harm which it causes by undermining the right to equality which is set out in section 15 of the *Charter of Rights and Freedoms*.

The first of the two harms we argue should be handled by *Criminal Code* provisions which penalize failure to take steps to protect members of the public from involuntary encounter with pornographic material. The objective here is to encourage control and regulation rather than to proscribe. The second, we feel, requires direct proscription of certain forms of pornographic representations. Conscious of the concern that when the law moves beyond the prohibition of conduct which causes direct, demonstrable harm, there is a danger of excessive intrusion by the state into the lives of individuals, we have focussed on the most extreme forms of pornography. These in our minds clearly subvert the equality rights in the *Charter* and more generally the right of all individuals to be treated with respect and dignity. Moreover, they can be stated with sufficient precision to provide direction to those who have to gauge their actions according to the dictates of the law, and to the law enforcers so that undesirable interferences with freedom of expression are minimized.

We appreciate that our proscriptions will not satisfy everyone. Those of conservative mind will consider us too libertarian in our view that the bulk of pornography should be regulated rather than banned. Some feminists too may feel that we have circumscribed the pornography which is to be prohibited too narrowly. Liberals for their part may find our movement outside the traditional boundaries of harm untenable. It is our belief that, given the complexities of this area, and the conflict of philosophies to which it gives rise, our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance over the present state of the law.

2. Terminology

We were often told during the public hearings that a useful starting point for the reform of the law relating to pornography would be to remove the term obscenity from the *Criminal Code*. Along with obscenity would go the heading of the part of the *Code* in which it appears: "Offences Tending to Corrupt Morals".

Those who pressed for the removal of the term "obscenity" did so primarily because of their perception that sexual immorality was not really the essence of the offence in the pornographic material available today. Rather, in one way or another, the material is demeaning and degrading to women, to members of minority groups who may be portrayed in a distorted way, and ultimately to men, who are often depicted as soulless aggressors.

For some advocates of the change in terminology, the issue is not as ideologically significant. They are motivated by various reasons, ranging from a desire to signal a new approach, to a dislike of existing obscenity jurisprudence.

We agree with the suggestion that the term "obscenity" has outlived its usefulness. As we have discussed at some length in chapter 4, entitled "What is Pornography?", the fact that the dictionary definition of "obscenity"

transcends the legal definition in the *Criminal Code*, and that the imprecise terms of section 159(8) have produced more confusion than light mean that the word has little to offer as a term of legal art. Moreover, we think that the heading, with its emphasis on the corruption of morals reflects an outdated concern, one which deflects attention from the real nature of the problem which the criminal law should be addressing, the denial of human dignity.

Recommendation 1

The term "obscenity" should no longer be used in the Criminal Code, and the heading "Offences Tending to Corrupt Morals" should also be removed.

We have already stated that we do not plan to make the term "pornography" central to the definitions in our proposed amendments. It is simply too elusive to provide the precision needed in the criminal law. However, we do not consider it worthwhile to eschew the term altogether. It does convey an idea about the material we are seeking to control and an entirely new term is not only difficult to find but may not be as accurate. Accordingly, we use the term pornography in our proposed sections, although we have been sparing in that use. The most obvious use is that in the various headings we have given to proposed sections. We see as quite acceptable the use of the term pornography in this way, because any elasticity in the title is limited by the specific terms of the section or subsection. Moreover, in the title, it serves as a useful indicator of the shift in approach from a traditional moral concern with obscenity, to our more functional social concern with pornography.

The term "pornography" appears rarely in the draft sections. In a few sections, we use the term "visual pornographic material", which is defined in quite particular terms to minimize discretion or subjective considerations. This definition is the only place in the draft provisions which actually features the term "pornography".

Recommendation 2

New criminal offences relating to "pornography" should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.

3. Violent and Degrading Material

In discussing the meaning of the word obscenity, in Chapter 4, Section II, we made the point that there is some material which would be considered obscene, but which would not be considered pornographic. Violent material which has no sexual connotations, and disgusting material, are the two large categories of material which might well not be caught by a "pornography" approach. We note with some interest, of course, that although common understanding might include the explicitly or extremely violent within the term obscene, because it causes revulsion, the present criminal law does not prohibit material featuring only violence.

The mandate of the Committee was to study the effect and make recommendations with respect to the material that has some sexual content. At the present time the *Criminal Code* considers potentially "obscene" material in which sex and one of a number of other items is present, namely, crime, horror, cruelty or violence. As we have reviewed the material which is available and listened to people across the country, the issue of whether violence in and of itself can be so offensive or harmful that some restrictions on it are needed arose quite frequently.

Virtually everyone who raised the issue thought that violence on its own can indeed be obscene. In fact, some people who raised the issue believed that violence in the media was more of a problem than explicit sexual portrayals. The term "obscene" used in the *Criminal Code*, could, in our opinion, easily include more than just sexual material, although as we have indicated it does not currently do so. We did consider whether the retention of the term obscene would be preferable because it could allow for offensive non-sexual material to be caught. We decided, however, that we would not recommend such a course of action because it would be building yet more meaning into a term which is already highly problematic. Our focus has been on pornographic material and we propose significant changes to the way in which the *Code* deals with such material. We have not examined in any detail the problems associated with violent material that has no sexual content. Nevertheless, having given some attention to the matter, we are of the opinion that the government should give consideration to establishing a section in the *Code* which would deal with violent material in a manner similar to the one we are proposing for sexual material. We realize that a sanction against violence is potentially far-reaching and intrusive and careful study is necessary before changes to the law can be recommended.

Recommendation 3

The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.

There is at least one offence in the present *Code* which does relate to disgust: subsection 159(2)(b) prohibits the public exhibition of a "disgusting object". In our view, little that is necessary for the protection of basic values would be lost by removing altogether the penalties against material that is disgusting, provided that the criminal law regime we are recommending is in place. We have reached this conclusion because we have tried to address in our proposed sections the real harms which we think were aimed at by the prohibition against such material, like the public display of sex aids. In particular we have replaced the prohibition on the public exhibition of disgusting objects, with a section aimed at preventing access (by way of sale or display) by children to devices intended for use as sex aids. This is found in the part of the report relating to children.

Recommendation 4

There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence relating to a disgusting object.

4. What to Control?

It was apparent at the public hearings that many people thought that the portrayals of women and children in the media generally were distorted and false depictions. We were frequently reminded that women are often seen in limited and mindless roles in television programs, as overwhelmingly concerned (to the exclusion of other interests) with marriage in popular paperback series, and as people whose sexuality can be used to sell virtually any commodity. On this view, pornography is one variant of a pervasive and dominant theme that runs through all the media, albeit a more extreme variant than some others. The argument has been raised, however, that pornography may be less harmful than the everyday, run-of-the-mill depictions in the media which we so often take for granted. This view stems from the belief that, as widespread as pornography is, the mainstream media touch the lives of virtually every single Canadian whether man, woman or child. Therefore, to seek to control what is probably a small percentage of the false depictions and leave out of the picture the vast majority of them is inconsistent and most certainly not going to achieve the result which we are ultimately seeking, that is, a reduction or elimination of such depictions.

While the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can be achieved through *Criminal Code* provisions. What is required is re-orientation of the values and priorities of the media. This is not something that can be addressed through criminal law. Given the sheer volume of material which would be involved, criminal sanctions would not be effective and more likely to bring the law into disrepute than to solve the problem.

Moreover, broad based support is lacking at this time for the view that the content of the media is in need of the sort of re-orientation we have heard suggested. Certainly, many women's organizations see this as an important issue, one to which they are continually and effectively drawing people's attention. Similarly, religious and ethnic associations have been concerned about how they are portrayed in the media. But the efforts of these groups, especially women's groups, are quite recent in origin and have not, we think, been accepted into our everyday assumptions about the media and its content. That we are moving in the direction of accepting them is seen by the adoption of new content guidelines by the CRTC and amendments to the *Broadcasting Act*. However, these changes have not been accomplished simply for the asking, but have involved long and intensive lobbying and negotiations between interested groups, governments and the media.

We are, therefore, in need of extensive educational and informational programs to address the concern that some have about general media content and its portrayal of people. The use of the criminal law is neither an appropriate nor a practicable means for counteracting such a pervasive problem. That is not to say that legal strategies are inappropriate. Given the existence of regulations governing the media, it is certainly legitimate in our view to use the regulatory process to address these issues. Indeed, the Committee makes a series of recommendations relating to the control exercised by the CRTC over programming which are designed to combat sexist messages in the broadcast media.

The question then becomes whether or not there is any material which is so extreme or harmful in its depictions that it is qualitatively different from the general content and for that reason deserves to be treated differently. In essence, is there any material which should be subject to criminal sanction if it is produced, sold or displayed, for example? Canada, along with other western countries has so far answered "yes" to this question.

As we have already noted, we are convinced that some material of a sexual nature can be so damaging to individuals and society that it must be the subject of the criminal sanction. The crux of the issue, of course, is to define the precise nature of the material which should be prohibited or regulated in such a way as to include only the specific sorts of things which are harmful. Our ability to do this depends on our understanding of what it is about the material which causes the damage.

It is, in our view, a significant social fact that many people are offended by some kinds of material. They would not choose to view it, if given a choice, and they are offended or upset when they cannot avoid seeing it. These feelings of offence and disgust can, in our estimation, justify restraints on the display of pornography, although we do not think that these sentiments would justify criminalization of, say, producing the material. The feelings of embarrassment of individuals, no matter how many, are not a proper basis for a substantial curb on freedom of speech.

How far should the boundaries of control be extended beyond restraints on display of offensive material? As our analysis of pornography in Canada today, in Chapter 6 of Section I demonstrates, we do not have consistent and conclusive research data to tell us about all the effects of pornography and in particular whether direct, demonstrable harm is caused, and we cannot be drawn too far into surmise or speculation. Our approach is characterized by acceptance of the egalitarian argument that impairment of a fundamental social value can properly be regarded as a "harm" meriting legislative control.

Proceeding from this point of departure, we have developed a three-tier analysis of pornographic material. The first tier is material which we would subject to a criminal sanction, with no defences based on artistic merit, educational or scientific purpose. The penalties for the offence are strong. In this tier we place the following: a visual representation of a person under 18

years of age participating in explicit sexual conduct and material which advocates, encourages, condones or presents as normal the sexual abuse of children; and visual pornographic material which was produced in such a way that actual physical harm is caused to the participant or participants.

The case with respect to these forms of pornography has been made very fully in the part of the Report dealing with children and we do not intend to repeat it here.

With respect to the remaining category, there are, in our view, two reasons for prohibiting visual material in the production of which actual physical harm was caused to the person or persons depicted. The first and obvious one is to protect those who participate in the production of visual pornographic material from physical harm. It is likely, of course, that in the case of material produced outside Canada the acts that would result in such harm being caused would themselves be caught by the criminal law of the country in which they were committed. With domestically produced material, other provisions in the *Criminal Code*, for example those relating to assault, might be applicable, especially if no consent to the physical harm was evident. Be that as it may, it seemed to us, as it seemed to the Williams Committee, to be appropriate to provide this additional deterrent to the causing of such harm. We know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter. Clearly, if the commercial dealings in material of this kind could be stopped, the reason for producing it would disappear.

The second reason for prohibiting this material lies in the message that most, if not all, of it conveys. That message is that it is acceptable to cause physical harm in the context of sexual relations. Whether or not it can be demonstrated empirically that this message is absorbed by the viewer, and acted upon, we believe that it is appropriate to use the criminal law to prohibit its dissemination. The social harm which is caused by the undermining of human dignity and the challenge to the equality of women is as stark here as it is with mere representations of physical harm. We elaborate on this facet of harm in our discussion of tier two material below.

We do not anticipate that this provision will often be activated. We doubt that the causation of actual physical harm is a widespread problem in the production of pornography. Moreover, there are obvious problems of proving that harm was actually caused. However, it will be available for dealing with the occasional outrageous case.

Far more pervasive is the material in which physical harm or abuse is represented in simulated depictions. This material which we consider offends equality rights and the more general right to respect for human dignity is dealt with in the second tier and is labelled "Sexually Violent and Degrading Pornography". Unlike the material in tier one, that in the second tier is subject

to the defences of genuine educational or scientific purpose, and artistic merit. The rationale for allowing defences is set out below in our discussion of the new formulation of section 159 of the *Criminal Code*.

We consider it important to comment at some length on why we have included this second tier, and the character of the harm which we feel justifies the intrusion of the criminal law at this point. As we stated in the introduction to this chapter we have concluded that the legitimate ambit of the criminal law extends beyond the causation of demonstrable, tangible harm to an individual or individuals. While recognizing the concern which liberals have that to extend the reach of the criminal law further is to open the door to abuse and possibly tyranny, we believe that there are values and policies which are so important to the welfare of Canada that they are worth protecting in their own right, even by criminal sanctions. This position which we have adopted seems to us to accord with the view taken by both the Law Reform Commission of Canada and the Department of Justice in their studies on the purposes of the criminal law.¹ As we have noted in our discussion of the role of criminal law in Part I, Chapter 2, the two studies see the criminal law as having both the prevention and penalizing of harm to the individual and the protection of social values as legitimate objectives.

More importantly, we believe that the *Charter of Rights and Freedoms* expressly recognizes that certain social values and policies, in particular equality "before and under the law" and "equal protection and equal benefit of the law" are entitled to both constitutional affirmation and protection, and take their place alongside the traditionally protected freedoms such as freedom of conscience, religion, thought, belief, opinion and expression. In our minds there are two possible legal consequences which flow from this recognition accorded to equality rights. In the first place it may be argued that the effect of section 15 of the *Charter* is to limit the ambit of freedom of expression in section 2(b) to exclude forms of expression which offend equality rights. The alternative position one can take is that the combined effect of section 15 and section 1 which contemplates reasonable limitations on the rights and freedoms set out in the *Charter* is to validate reasonable legal constraints, including those of the criminal law, on the exercise of rights and freedoms by individuals or groups which adversely effect or threaten the rights in section 15.

While observations on the effect of the *Charter* are in many respects still speculative, we note that the position which we have taken does have judicial support in the careful judgement of Mr. Justice Quigley of the Alberta Court of Queen's Bench in *R. v. Keegstra*,² a decision to which we have already referred to in Part II, Chapter 8, where we discuss the general impact of the *Charter* in relation to the issue of pornography. Mr. Justice Quigley in addressing the issue of whether section 281.2(2) of the *Criminal Code* (wilfully promoting hatred against any group by communicating statements) was an infringement of "freedom of expression" under section 2(b) of the *Charter* made the following remarks:

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Section 15 of the *Charter* guarantees a right which rationally flows from our affirmation that men remain free only when freedom is founded upon respect for moral and spiritual values. We have recognized that Canadians have a moral sense, that is a sense of what is good and what is evil. Section 15 also manifests in the concrete as opposed to the abstract, our affirmation that each human person has dignity and worth...³

In my view, the wilful promotion of hatred under the circumstances which fall within section 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of our society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.⁴

The judge concluded that section 2(b) of the *Charter* did not contemplate "an absolute freedom permitting an unbridled right of speech or expression". Furthermore, if he was wrong in this view, he found that section 1 provided a basis for balancing that freedom against the furtherance and protection of desirable social policies and values with which it conflicted in certain contexts. After carefully assessing the rationality and proportionality of the *Criminal Code* provision, and comparing it with the laws and customs of other free and democratic societies, he concluded that the "promoting hatred" provision in the *Code* constituted a reasonable limitation on freedom of expression.

We agree with the views and sentiments expressed in Mr. Justice Quigley's judgement, and we believe that they have application in the present context. In the same way that freedom of expression may not extend to statements wilfully promoting hatred, or be outbalanced by the need to protect the equality rights of others, so the same conclusions can be reached in the case of certain forms of pornographic representations. We believe this to be so in particular in those cases in which the pornographic representation depicts a particular group, typically women, as less than human, and their mistreatment as a legitimate subject of sexual stimulation, typically male. We observe that section 15 of the *Charter*, insofar as it addresses the equality rights of women, represents the culmination of a long and agonizing process whereby Canadian society has come to accept and to commit itself to the policies and values associated with equal treatment of the sexes in the political, economic and social spheres. This has been reflected in both legislative and policy strategies to improve the position of women in employment, education, within the social welfare system and within the family unit. Indeed, it is a set of policies and values to which the present government has given its unqualified support in recent policy announcements relating to equal opportunity in employment. In our opinion the most hateful forms of pornography are subversive of policies and values favouring equality. While it may be difficult to characterize the representations as amounting to the promotion of hatred, they do contain a clear message that half of the Canadian population are entitled to nothing better than violent, sexual abuse, all in the cause of the supposed sexual and psychic welfare of the other half. They do so in a context, that of sexual relations, in which a combination of a desire to dominate and emotion can pose

significant dangers to the female partner. As we pointed out in Part I, Chapter 2, we recognize the importance of sexuality to a person's status as an adult, and the need to respect that facet of the physical and psychic welfare of each individual. However, we also believe that there are necessary limits to how that sexuality is manifested. In our view the limits of tolerance are reached when domination and violence infect the relationship. While it is not proven that representations and depictions of sexual violence pose the same threat to the welfare of women as the conduct itself, we are of the view that they lower the status of women and thus contravene their right to equality. In fact they strike at the very root of the policies and values of Canadian society, which, as Mr. Justice Quigley observed, are premised on the dignity and worth of all its members.

We recognize that sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context. It may be difficult to bring these representations within the ambit of section 15 of the *Charter*. However, we are of the view that while that may be true, the material nevertheless offends the value of respect for human dignity of which Mr. Justice Quigley spoke in *Keegstra* and which is obviously broader in its scope than section 15. Accordingly, we think that a proscription against it of the type we suggest can be justified as a reasonable limitation on freedom of expression and thus saved by section 1 of the *Charter*.

Having taken this stand we are of course aware of the limitations of the criminal law in promoting and protecting values, especially where there is no or only speculative harm being caused. Moreover, we know that the criminal law can be a blunt and inappropriate instrument for working social change. We are, however, confident that with careful attention being paid to the material which we see as destructive of the social consensus which we refer to above, and the clear articulation of the conduct which we think should be proscribed, a valid statement of criminal law can be made, which not only sets out with clarity the limits of what is acceptable and unacceptable in Canadian society in terms of pornography, but also which can be enforced effectively without creating unwarranted curbs on freedom of expression.

Although it is mainly violent and sexually abusive material which we have focused on in framing our second tier recommendations for amendment of the *Criminal Code*, we have also thought it appropriate to apply the criminal law to representations which, while they do not offend the equality provisions of the *Charter* do depict conduct, such as incest, bestiality or necrophilia, which is considered socially repellent and personally degrading. We find it difficult to see how representations of such conduct would be protected by freedom of expression. Even if that freedom was extended that far, we believe that the concern to uphold social values, which is evident both in deepseated revulsion to this type of behaviours, and in its criminality, justify reasonable limitation of the freedom in terms of section 1 of the *Charter*.

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Having stated the Committee's views in respect to sexually violent material, we do acknowledge that our rationale for including some material, within the purview of the *Criminal Code* will not be universally acceptable. Some people will still argue that we need a stronger and more direct relationship between the use of pornography and identifiable harms to particular individuals. In addition, there will be a more general concern about how the legislation might read. It is obviously important that the legislation not inadvertently encompass material that lacks the harmful effects of the material at which the legislation is aimed.

It was this latter problem that led the Committee to recommend that sexually violent and degrading material be prohibited and to state as clearly as possible what we mean by those terms. We have consciously rejected the use of broad terminology which would leave the characterization of the material to a test, such as the present test of community standards of tolerance.

The community standards test has been soundly criticized by everyone who has been affected by decisions made under it. Most of the criticism is directed at the impossibility of knowing what the Canadian (i.e. national) community standard is. It has been pointed out by judges, and demonstrated by other judgements, that the standard is subject to regional variation. Moreover, the standard changes over time so that publishers, for example, can only guess at what the standard is in any given year. Furthermore, while a changing standard has some value to it in that it ensures that the law does not become completely out of tune with current realities, it does give rise to what some people at the public hearings referred to as "creeping gradualism." (In the minds of some it was not so much creeping as galloping.) That is, the most extreme material which is allowed becomes the standard against which everything else is measured. The technique of publishers, therefore, who do not want any restraints on what they can produce is to constantly push the boundary of what is considered to be outside the law.

A further criticism of this test is that it lacks a principled foundation. Simply because a majority of Canadians are said to tolerate or not tolerate something tells us nothing about their reasons for doing so and hence gives us no opportunity to decide whether they are indeed valid. It is our view that decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses.

Much of the material which people brought to the attention of the Committee was presented as material which degrades women. While we have argued that some pornographic material is harmful to our fundamental values, and in this sense we have concurred with those who see it as denying women equal status with men, we have nevertheless not used the term "degrading" in our proposed amendments to the *Criminal Code*. The term appears as a heading to the material which we believe is the most subversive of social values. In this sense it is an appropriate heading for the section since it highlights what we consider to be the problem with the material. We have not, however, used the term in our specific recommendations because we consider it to be too

imprecise and too broad in its connotations. As we have argued, much of what appears as mainstream pornography could be characterized as degrading to women. We do not want to run the risk of our definitions being cast so broadly that they are struck down by the courts on the ground of vagueness or because they catch too much. Furthermore, the use of the term "degrading" would result in a more subjective element being introduced into the assessment of the material. The variable scope ascribed to the term "degrading" during the public hearings, and the occasional but worrying challenges made to literary works which treat sexual relationships openly and sensitively illustrate the difficulties which exist with interpreting such a term. We have tried as far as possible in framing our recommendations to minimize the opportunities for subjective judgements. Our approach here, as elsewhere, has been to state what depictions or descriptions are unacceptable as precisely and clearly as we can.

The third tier of materials is one which we do not consider merits criminal sanction, except in very narrow circumstances. This third tier consists of "visual pornographic material", defined as material in which is depicted vaginal, oral or anal intercourse, masturbation, touching of the breasts or genital parts of the body, or the lewd exhibition of the genitals. Although the language of the definition is broad enough to include both explicit material involving children and sexually violent pornography, we wish to make it clear that in our view, neither of these kinds of materials falls within tier three. These two forms of materials fall into tier one and tier two respectively.

In drafting this provision, we have been mindful of the difficulties of trying to devise a comprehensive list of activities, the depiction of which is to be controlled. These difficulties led the Williams Committee to recommend, instead of a list, a test of offensiveness, which turned on the sensibilities of the "reasonable person". We have concluded that such a flexible test would be more problematic in its operations than the use of a list. The latter is likely to provide clearer guidance on the type of material which is caught. While our list may require further refinement, we are inclined to believe that it is adequate to the task of characterizing tier three material.

It will be noted that we have employed the term "lewd" to describe certain of the representations in the definition. We do this because we wish to make it clear that it is not all representations of the breasts or genitals which should be caught by this definition. It is obviously important to distinguish a poster centre fold of *Playboy* which should be caught as tier three material, and a poster of Michaelangelos' *David* which should not. The use of the adjective "lewd" is designed to allow the law to discriminate between what is patently offensive when displayed in public and what is not.

We think that the only problem which merits the application of the criminal law in connection with tier three material, is that of display. Accordingly, we have proposed criminal penalties for displaying the material without a warning in premises to which the public has access, as well as the restrictions on sale to and access by children which is included in the children's part of this report. We believe that the provisions provide the necessary

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Although we have devised this three-tier approach primarily to guide our thinking on the criminal law, we believe that it also serves to rationalize, as well, the relation between the federal and the provincial spheres. In our view, the proper approach is for the provinces to concentrate their regulatory efforts on the tier three material. We would hope to see a regime in which, apart from the recommended display offences, tier three material is entirely regulated by the province. The main question with respect to this material is availability, so that its potential to create offence to adults or do harm to children will be contained. Provincial film regulation schemes and municipal display by-laws seem particularly well suited to this role.

We have agreed in Chapter 14 on film classification and censorship that film and video material which does not fall within the proscription we have recommended in the *Criminal Code*, should be subject to classification rather than censorship. Accordingly, in the case of film or video material which falls within tier three the application of a classification or rating system, with attendant warnings and entrance restrictions, would seem to us the most satisfactory way of dealing with the display problem. In the case of hard copy material, especially magazines, we believe that municipal regulation requiring warnings, barriers, or opaque covers is an appropriate method of responding. Provincial law and municipal by-laws of the type mentioned above would also have application to tier two material which is protected by the defences of genuine educational or scientific purpose or artistic merit.

Recommendation 5

Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, bestiality, incest, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.

Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

Material or productions in the third tier would attract criminal sanctions only when displayed to or performed before the public without a warning as to their nature or sold or made accessible to people under 18. Unsolicited mail incorporating such material is also included. In tier three is visual pornographic material or performances in which are depicted vaginal, oral, or

anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

5. Offences Relating to Pornographic Material

5.1 Section 159

The basis upon which we have constructed this replacement for section 159 has been discussed in the first part of this chapter, and so we will not repeat it here. However, we do wish to highlight certain features of the proposed legislation.

The first thing to note is the terminology we have used. We have tried for the most part to be specific in our choice of terminology, avoiding the use of vague words such as "degrading". As a result, we have drafted our offences in terms of descriptions of certain kinds of acts. The offences in relation to tier two material, for example, contain a list of acts like incest, bestiality and necrophilia. These acts are, in and of themselves, criminal offences. The term "sexually violent behaviour", which also appears in the list, is defined to include "physical harm depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer". This general part of the definition recognizes that the element of context has an important role to play in determining whether portrayals of physical harm are wrongful. More especially, it embraces the combination of violence and sexual conduct, and violence and sexual stimulation which we consider to be so destructive of the dignity and worth of human beings in general, and women in particular. To supplement the general formulation, we have given specific examples, like murder, and self-inflicted harm. All of the elements of this list except for self-inflicted harm are, once again, crimes. We include self-inflicted harm because it is typically portrayed in a context which makes it appear that the actor, usually a woman, enjoys and deserves the pain. This we see as just as objectionable as the representation of physical violence by others, which suggest the legitimacy of such conduct, and worse still, its acceptance by the victim. By thus staying close to what is itself criminal in formulating our definition, we hope to avoid making it so broad that it would catch images which, while perhaps objectionable, should not be criminalized. We wish to note in this connection the two definitions of "visual pornographic material" which appear in the proposed section. One of them, which applies in the case of section 159(1), reflects both the sexually explicit and the sexually violent. However, when we come to define "visual pornographic material" in dealing with the offence of displaying tier three material, we have removed from the

definition the phrases sexually violent behaviour, necrophilia, incest and bestiality. We also specify that this class of representations does not include pornographic representations of children, material advocating the sexual abuse of children, or material in which it appears that harm was done to the participants.

In drafting the offences to deal with tier one and tier two material, we have maintained the distinction now made in section 159 of the *Code* between those who produce and distribute prohibited material and those who are involved in the retail trade in such material. In our view, a distinction along these lines is appropriate in this area for two reasons. First, it allows for recognition to be given in the *Code* to the fact that producers and distributors of material of this kind are in a better position to know its content than are retailers. Recognition of this fact, which is now reflected in section 159(6) (i.e. that ignorance of the nature or presence of the material is no defence) we have embodied in both a new section 159(5) and a new section 159(6). The former is a slightly revised version of the existing 159(6); it provides that it is no defence for a producer or distributor to show that he was ignorant of the character of the "matter or thing" in question. The latter makes provision for a "due diligence" defence for retailers.

The "due diligence" defence is intended to protect the responsible merchant who tried to review the materials coming into his establishment, and to comply with the law. We realize that merchants are not going to be able to interpret in every case what is and is not within the section. However, the fact that they have tried will be of help in the event of a prosecution. The conduct we wish to deter is that of the merchant who accepts without question any material provided by a distributor, and pays no attention to those whose rights are adversely affected by it.

The second reason for distinguishing between producers and distributors on the one hand, and retailers on the other, lies in the need to ensure that the punishment fits the crime. In our view, the production and distribution of prohibited material has to be treated more harshly than the retail trade in it. It is well known that it is in the production and distribution of this material that the real profits are made, and the penalties for such activities must be severe if the law is to have any significant deterrent effect.

In proposing that this distinction is to be continued, the Committee has not forgotten that the Ontario Court of Appeal has held that the existing section 159(1)(a) and section 159(2)(a) overlap to some extent.⁵ It is clear that, to the extent that these two offences do overlap, the purposes underlying the distinction are defeated. We have attempted to deal with this problem both by making it clear that the rental of prohibited material is caught by the retailing offence and by removing the word "circulates" from the producing and distributing offence. We are not overly confident, however, that these changes will succeed in overcoming the Ontario Court of Appeal's decision. It may be, therefore, that further changes to the language used in these sections will be necessary.

It will be noted that in our formulation of section 159(2), Sexually Violent and Degrading Pornography, we have included the defences of genuine educational or scientific purpose, and artistic merit. It is important that we state our reasons for these exceptions which are contained in section 159(2)(d) and (c).

The defence of genuine educational or scientific purpose reflects our belief that in certain contexts the production, distribution and sale of this material may be quite legitimate. While descriptions of incestuous relationships of the sort described in some entertainment magazines are clearly not tolerable, very detailed descriptions of incestuous relations, perhaps with explicit photographs of the physical harm done to a young victim of incest by an adult, are entirely appropriate within a medical setting or the training of professionals who work with families in trouble. Here the material is acceptable or unacceptable not on the basis of what it describes or depicts but on the basis of its purpose. However, materials produced for genuine educational or scientific purposes may be sold for less noble reasons. We have provided for this contingency by relating the defence in the case of retailers both to the original purpose of the material and the purpose of its sale.

Some people will argue that there can be no such thing as an artistic defence of material which is sexually violent. Because the depiction meets some academic or elitist concept of artistic does not make it any more acceptable. While we have sympathy with this view we consider it essential to provide for such a defence in order properly to balance the competing rights of equality and freedom of speech. Both of these are entrenched in the *Charter* and clearly the law cannot be used to support one to the total exclusion of the other. Artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. It would not be acceptable to us to say that the matters dealt with in the second tier cannot be presented in artistic works. Indeed, to say so would be to put a significant range of artistic and literary material dating back to antiquity at risk. We wonder, for example, how these two ancient Greek classics, "Oedipus Rex" and "Electra", and the work of the Roman historian Suetonius would fare without such a defence. In some cases the need to protect freedom of expression must predominate.

We note in passing that the Committee has considered two different approaches to artistic works that might fall within the ambit of our second tier. On the one hand, it can be argued that because the work in question is, indeed, artistic, its message is different from, for example, the message in a similar depiction or description in an "adult entertainment" magazine. The fact that it is art, on this view, transforms the depiction or description into something which is no longer harmful. On the other hand, it might be said that both the artistic work and the adult magazine contain an equally harmful message but that in the former case the genre is of sufficient importance that we will nevertheless protect it. While the Committee has adopted this latter view, it should be noted that the question of whether works of art can be pornographic

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or whether those terms are mutually exclusive has been the subject of considerable discussion in academic literature.

We recognize, of course, that these defences, especially that of artistic merit, introduce a subjective element into the determination of what is pornographic for the purposes of the criminal law. Given our concern to strike a balance between the protection of equality rights, and freedom of expression, we cannot see how that can be avoided. Moreover, we are of the view that decision makers with the benefit of the evidence of expert witnesses will have less of a problem distinguishing what is artistic from what is not than they do with applying the present slippery test of what is obscene. Instead of trying to define the answer to the broader question of what the Canadian community would consider tolerable, they will have to reach a determination of artistic worth by considering the producer or maker's purpose, together with its status within the artistic or literary community. While this will no doubt be a challenging task, we think that it will be a manageable one. The process of decision making is certainly assisted by section 159(2)(h) which establishes the contexts in which the impugned material is to be judged and differentiates them depending upon whether the material is part of a more extensive production or story, or merely a detached segment.

We have included within section 159(2)(c) a display provision relating to Sexually Violent and Degrading Pornography. We think it important to distinguish this method of dealing with proscribed pornographic material from its sale and rental, in particular because it is necessary to provide for material which falls within the exceptions allowed by section 159(2)(d) and (e). It would obviously not make sense for material which, were it not for its purpose or character, would be proscribed, to be displayed openly and without regulation.

It will be noted that in relation to both exempted sexually violent and degrading material by section 159(2)(g) and tier three material by section 159(3)(b) we have stipulated that no one shall be convicted of the offences where an adequate warning notice has been located where it can be seen by those entering the premises or part of the premises which contain pornographic material. The Committee considered whether an exemption should be included for museums, art galleries and the like. Some of its members felt a little disconcerted by the realization that establishments like the Royal Ontario Museum, for instance, might be required to post warning notices because of concern about the possibility of pornography lurking within their walls. Attempts to draft such an exemption floundered on the issue of how to ensure that the exemption would only be available to legitimate establishments of this type. For this reason an exception has not been included.

The penalties provided in the draft section are intended to reflect our view of the seriousness of these offences. Many of them are higher than the penalty now provided for breach of section 159. Where possible, we have specified the amount of the fine which can be imposed by a court convicting someone of a summary conviction offence. Subsection 722(1) of the *Code* provides that

where there is no other provision made by law, a fine of \$500 or six months imprisonment or both can be imposed for a summary conviction offence. While we have no objection to the six months imprisonment, and reflect that in our sections, we consider that the maximum fine of \$500 was far too low. In some cases, we have made that a minimum fine.

Because of the provisions of paragraph 647(b) of the *Code*, we cannot impose these higher penalties upon a corporation convicted of a summary conviction offence. Elsewhere, in Part IV on Children, we recommend that paragraph 647(b) be amended, so as to provide for a higher penalty for a corporation convicted of a summary conviction offence, or to allow the drafter to attach to any particular offence a penalty higher than that set out in paragraph 647(b).

We have, however, provided for a penalty against an officer of a corporation who is implicated in the commission of the offence. We believe this to be essential in making it clear that legal responsibility for the production, distribution, sale, rental or display of this material is both a personal and a corporate responsibility. More particularly it obviates the possibility that the human agents in dealing with the material will try and shield themselves by shifting responsibility to the corporate entity.

Finally, we have incorporated a forfeiture provision in proceedings under section 159(1)(a) and (b) and 159(2)(a) and (b) which allows the Crown to dispose of offensive materials and copies thereof. This power is important, if the full implications of a conviction are to be realized. Without it, it would be all too easy for other distributors or retailers to continue dealing in the material which had produced a conviction, leaving to the Crown the sole recourse of further prosecutions.

Recommendation 7

Section 159 of the Criminal Code should be repealed, and replaced with the following provision:

PORNOGRAPHY CAUSING PHYSICAL HARM

159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than \$500 and not more than \$2,000 or to imprisonment for six months or to both.

(c) "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia,

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of the body, or the lewd exhibition of the genitals.

SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY

159(2)(a) Everyone who makes, prints, publishes, distributes or has
in his possession for the purposes of publication or distribution any
matter or thing which depicts or describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest, or
- (iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five
years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale
or has in his possession for the purpose of sale or rent any
matter or thing which depicts or describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest, or
- (iv) necrophilia

is guilty

- (i) of an indictable offence and is liable to imprisonment for
two years, or
- (ii) of an offence punishable on summary conviction and is
liable to a fine of not less than \$500 and not more than
\$1,000 or to imprisonment for six months or to both.

(c) Everyone who displays any matter or thing which depicts or
describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest; or
- (iv) necrophilia

in such a way that it is visible to members of the public in a place to
which the public has access by right or by express or implied invitation
is guilty of

- (i) an indictable offence and is liable to imprisonment for
two years, or
- (ii) an offence punishable on summary conviction and is
liable to a fine of not less than \$500 and not more than
\$1000 or to imprisonment for six months or to both.

(d) Nobody shall be convicted of the offence in subsection (2)(a)
who can demonstrate that the matter or thing has a genuine
educational or scientific purpose.

(e) Nobody shall be convicted of the offence in subsection (2)(b)
who can demonstrate that the matter or thing has a genuine
educational or scientific purpose, and that he sold, rented,
offered to sell or rent or had in his possession for the purpose of
sale or rent the matter or thing for a genuine educational or
scientific purpose.

(f) Nobody shall be convicted of the offences in subsections (2)(a)
and (2)(b) who can demonstrate that the matter or thing is or is
part of a work of artistic merit.

(g) Nobody shall be convicted of the offences in subsection (2)(c)
who can demonstrate that the matter or thing

- (i) has a genuine educational or scientific purpose; or
- (ii) is or is part of a work of artistic merit,

and

(iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

(h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

(b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.

(c) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

FORFEITURE OF MATERIAL

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

ABSENCE OF DEFENCE

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

DUE DILIGENCE DEFENCE

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

DIRECTORS

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

DEFINITIONS

159(8) For purposes of this section, "sexually violent behaviour" includes

- (i) sexual assault,
- (ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

5.2 Section 160

Section 160, the forfeiture provision of the *Code*, received little comment either at the public hearings or in the briefs submitted to the Committee. Such comment as there was tended to be general in nature. Some groups thought that section 160 should be repealed because it amounted to a general power to censor. Other groups thought that it should be retained and, in fact, used more often than it is.

The Committee is of the view that section 160 should be retained, at least insofar as tier one and tier two materials are concerned. In other words, taking forfeiture proceedings against the material itself should continue to be an alternative to a criminal charge with respect to material involving children, material advocating or encouraging the sexual abuse of children, pornography produced in such a way as to cause physical harm and sexually aggressive and degrading pornography. It would not be an option with respect to material that is in tier three. The reason for this distinction is explained below.

There are three reasons why we think that a provision like section 160 should remain in the *Criminal Code*. The first is that it provides a speedy way of resolving the question of whether or not material is in fact prohibited. The second is that it allows for that question to be resolved in proceedings in which there is no risk of anyone being convicted of a criminal offence. The third is that it provides private citizens with a useful and effective alternative to a private prosecution in situations in which, for one reason or another, the government has refused to act.

The second and third of these reasons require some explanation. In cases where it is clear that the material in question is prohibited, the Committee is of the view that criminal charges should be laid as quickly as possible. However, we agree with the opinion expressed by Judge Borins in *Regina v. Nicols* that, in cases where it is difficult to know whether the material in question is prohibited, there is an element of unfairness in proceeding by way of criminal charges. In those cases, which the committee hopes would be few and far between under the regime it is proposing, section 160 proceedings would be appropriate.

Insofar as the third reason is concerned, our public hearings revealed that there was a great deal of dissatisfaction about the reluctance of law enforcement officials in some provinces to take action against material that some

members of the public considered clearly to be obscene. In the Committee's view, a provision like section 160 should be available to private citizens so that they can act in situations where the government will not. We realize that a power such as this in the hands of private citizens is open to abuse. However, close scrutiny of the information upon oath which forms the basis of the application for a warrant to seize the material, should catch the obvious abuses. If it was deemed necessary, express provision could be made in the section for a power on the part of the Attorney General to stay proceedings in order to catch those abuses which surmounted this initial hurdle.

The Committee's reasoning on this point assumes that section 160, as it now reads, allows private citizens to initiate proceedings under it. As was noted in our discussion of the existing law, the courts appear to have accepted that it does. However, the point does not appear to have been argued and it may be advisable to make it clear that private citizens can invoke the section.

Two additional points about section 160 should be noted. The first is that, although the courts have accepted that the onus is on the Crown under section 160 to prove beyond a reasonable doubt that the material in question is obscene, the language of the provision suggests that the onus is on the other side to prove that it is not obscene. The Committee recommends that the section be amended to make it clear that the onus is on the Crown in such cases.

The second point relates to the use of juries in section 160 cases. At present, section 160 "show cause" hearings are heard by a judge alone. The Committee gave serious consideration to recommending that the party defending the material should be allowed to elect to have the case heard by a judge and jury. The rationale for such a recommendation would have been a desire to minimize the differences in the way in which criminal prosecutions (at least those commenced by indictment) and section 160 cases were handled. In the result, however, the Committee decided against making such a recommendation. Trial of section 160 cases by juries would make proceedings more lengthy and one of the main advantages of the section would be lost.

It will be recalled that the recommendation that section 160 be retained contained the proviso that its application should be limited to prohibited material. The reason for this is that, in the case of regulated material, the concern is with the circumstances of the sale or display, rather than with the material itself. Forfeiture proceedings in respect of such material would seem to make little sense.

Recommendation 8

Section 160 of the Code, allowing forfeiture proceedings to be brought, as an alternative to a criminal charge, should be retained in the Code but its application should be limited to tier one and tier two material.

Recommendation 9

To clarify the law on this point, section 160 should be amended to make it clear that the onus rests on the Crown under this section to prove beyond a reasonable doubt that the material comes within either tier one or tier two.

5.3 Section 161

Recommendation 10

Section 161 of the Code should be amended as follows:

161. Everyone who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may offend section 159(1) or section 159(2) of the Code is guilty of an indictable offence and is liable to imprisonment for two years.

This recommendation really changes little from what the section now provides. At present, the reference is the person's apprehension that the material might be "obscene or a crime comic". The change merely reflects the repeal of section 159 and enactment of the new provisions.

5.4 Section 162

It will be recalled that section 162 deals with the publication of reports of judicial proceedings. The section contains a general prohibition against the publishing of "indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals", as well as a more specific prohibition relating to divorce, judicial separation and nullity proceedings. In respect of the latter kind of proceedings, it is made an offence to publish anything other than names and addresses, concise statements of the charges, defences, legal submissions, the judge's summing up, the jury's findings and the court's decision.

The Committee is of the view that section 162 should be repealed. It most certainly cannot be sustained on the basis of the need to protect public morals. That may have been an adequate rationale in 1926 when the British legislation upon which section 162 was based was enacted. It is not an adequate rationale today. Moreover, it is difficult to see why "indecent matter [and] indecent medical, surgical or physiological details" that find their way into judicial proceedings should be deserving of special treatment in the law.

To the extent that there may be a concern about the privacy and other interests of participants in judicial proceedings, including witnesses, it may be appropriate to empower the judge to make a specific order with respect to the non-publication of certain matters arising during those proceedings. A model for such a provision might well be section 467 of the *Criminal Code*, which empowers a judge to ban the publication of evidence taken at a preliminary hearing. If broader protection for those interests is thought to be necessary, consideration might be given to enacting a provision along the lines of section 246.6(4), which prohibits the publication of the evidence of the sexual activity of a complainant in a sexual assault case.

Whatever the form such a provision would take, its purpose would be to protect the interests of those involved in the judicial proceedings. The provision

would not be based on a concern that the content, pornographic or otherwise, of the information conveyed might be harmful to those who read or see it. For this reason, the provision would not belong in the part of the *Criminal Code* that deals with pornography.

Recommendation 11

Section 162 of the Code should be repealed.

5.5 Section 164

Recommendation 12

Section 164 of the Code should be repealed and replaced by:

MAILING PORNOGRAPHIC MATERIAL

164(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

- (a) depicts or describes a person or persons under the age of 18 years engaging in sexual conduct,
- (b) advocates, encourages, condones, or presents as normal the sexual abuse of children

is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

- (a) by virtue of its character gives reason to believe that actual physical harm was caused to the person or persons depicted, or
- (b) depicts or describes:
 - (i) sexually violent behaviour,
 - (ii) bestiality,
 - (iii) incest, or
 - (iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who makes use of the mails for the purpose of transmitting or delivering unsolicited visual pornographic material to members of the public is guilty of an offence punishable on summary conviction.

(4) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing mailed

- (i) has and is being transmitted or delivered for a genuine educational or scientific purpose, or
- (ii) is or is part of a work of artistic merit.

(5) It shall not be a defence to a charge under subsections (1) and (2) of this section that the accused is ignorant of the character of the matter or thing in respect of which the charge was laid.

(6) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, violent behaviour, incest, bestiality, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

The new section 164 incorporates the changes made to section 159 and covers all three tiers. As we consider the retailers of tier one and two material

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as the equals in the production, distribution chain to the makers, printers, publishers and distributors referred to in section 159 (1)(2) and 159 (2)(a), we have concluded that ignorance of content should similarly not constitute a defence (section 164(5)). Moreover, the same maximum penalty should apply as is prescribed by section 159 (1)(a) and (2)(a).

In tune with our general approach to tier two material we have included the defences of genuine educational and scientific purpose, and artistic merit in section 164(4). It will be noted that in respect of the former the defence relates to both the nature of the material and the purpose of its mailing.

We include an offence of mailing unsolicited visual pornographic material in section 164(3). This is in essence the equivalent of the display provisions in section 159(3). The definition of "visual pornographic" material in section 164(b) has been framed to include "sexually violent behaviour, bestiality, incest or necrophilia", as the offence should embrace not only those materials which fall within tier three, but also those tier two materials which were covered by the defences in section 164(4). Members of the public need, in our opinion, to be protected from unsolicited transmittal of this type of material as they do from tier three material.

5.6 Section 165

Section 165 of the present *Code* establishes the manner of proceeding under, and the penalties for breach of, the *Code* sections dealing with publication, distribution and sale, tied sales, judicial proceedings, theatrical performances and use of the mails. As the sections we recommend have specific penalties attached, repeal of this section is in order.

Recommendation 13

Section 165 of the Criminal Code should be repealed.

6. Offences Relating to Pornographic Performances

6.1 Section 163

We have adopted the same approach to the control of live pornographic performances that we have taken to the control of pornographic material. Hence, the provision which we recommend be included in the *Criminal Code* in the place of the existing section 163 is divided into three different offences, one to deal with live performances that fit the description of tier one material, (section 163(1)) one to deal with live performances that fit the description of tier two material, (section 163(2)) and one to deal with live performances that fit the description of tier three material, (section 163(3)).

It may be thought to be unnecessary in the case of live performances to include an offence for those performances that involve actual physical harm. For, if physical harm is, in fact, caused in such a performance, those responsible for such harm can be dealt with under the assault provisions of the *Criminal Code*. In our view, the justification for including this offence lies in the concern the Committee has that an accused may be able to argue under an assault charge that the performer consented. Given what will sometimes be a very unequal relationship between employer and employee and scant respect on the part of the former for the rights and sensitivities of the latter, this concern is not entirely fanciful. The provision also attempts to ensure that those who put on productions which involve tier two material, but which attract the defence of artistic merit limit themselves to simulation. Over and above the actual harm being caused is of course the odious message which is transmitted by such performances.

With respect to live performances that fit the description of tier two material, there is a defence of artistic merit in section 163(5). Because we are in the realm of public display, however, an accused would be obliged to show not only that the performance had artistic merit, but also that the performance took place in premises containing an adequate warning. Live performances that fit the description of tier three material would be permitted under this proposal, provided they took place behind an adequate warning (section 163(3)). By section 163(4) ignorance of the nature of the performance is no defence to charges under section 163(1) and (2).

We are well aware that these proposals would produce a significant change in the law in this area, since it would mean that "live sex" shows would no longer be criminalized. We did not feel, however, that a criminal prohibition against such shows could be justified under any of the rationales that we have given for the other *Criminal Code* prohibitions we have recommended. Nor, in our view, could any other convincing rationale be found. Given our decision that tier three material should not be proscribed, a prohibition against the equivalent kind of live performance would have to be justified on the basis that live performances have some special quality about them that sets them apart from magazines, books, films and videos. The Williams Committee concluded that the physical presence of those involved in the sexual activity gave live performances a special quality. As they put it in their report, that presence results in a relationship between actual people that gives rise to "the peculiar objectionableness that many find in the idea of the live sex show, and the sense that the kind of voyeurism involved is especially degrading to both audience and performers." On this basis, the Williams committee concluded that live shows featuring actual sexual activity should be prohibited.

The difficulty we have with this line of reasoning is that even if one accepts that the idea of live sex shows may be objectionable to many and that the shows themselves may be degrading to both the performers and the audience, these are inadequate reasons for prohibiting such shows. The fact that people object to a particular activity is, in and of itself, no reason for making it illegal. Neither is the fact that those involved in it, provided they are adults, are degraded (whatever that may mean) by virtue of their involvement.

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The fact that "live sex" shows would no longer be prohibited would not, of course, mean that they would not be subject to any regulation at all. We have already recommended that provinces and municipalities should play a major role in the regulation of pornographic material that falls into tiers two and three. We make the same recommendation here with respect to live performances of a sexual character. Both the power to regulate local businesses and the power to zone can and should be used to good effect in this area.

Recommendation 14

Section 163 of the Code should be repealed and replaced by:

LIVE SHOWS

163 (1) Everyone who, being the owner, operator, lessee, or manager, agent or person in charge of a theatre of any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which

(a) involves actual physical harm being caused to a person participating in the performance, or

(b) represents:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest; or
- (iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents, or gives, or allows to be presented or given therein without appropriate warning a performance in which explicit sexual conduct is depicted is guilty of an offence punishable on summary conviction.

(4) It shall not be a defence to a charge under subsections (1) and (2) that the accused was ignorant of the character of the production.

(5) Nobody shall be convicted of the offence under subsection (2)

(b) who can demonstrate that

- (i) the performance is or is part of work of artistic merit; and
- (ii) the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(6) For purposes of subsection 3 it shall be sufficient to establish that an appropriate warning was given that the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(7) For purposes of subsection 3 "explicit sexual conduct" includes vaginal, oral or anal intercourse, masturbation, lewd touching of the

breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 15

The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.

6.2 Section 170

Recommendation 16

Section 170 of the Criminal Code should be amended to add the following provision:

This section has no application to a theatre or other place licensed to present live shows

Section 170 penalizes nudity in a public place without lawful excuse. The purpose of this exemption is to ensure that live performances will be proceeded against under section 163 of the *Code*, rather than this provision. As we have seen in our analysis of the present *Criminal Code* provisions on pornography in Chapter 7 of Section II, section 170 has been held to be applicable to theatrical performances notwithstanding the existence of specific offences relating to theatrical performances in section 163. We are of the opinion that to leave it open to the Crown to proceed under section 170 would be to allow an unwarranted departure from the three tier structure which we have developed.

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³ *Ibid*
⁴ *Ibid*
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Footnotes

¹ See Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*, Ottawa, 1975; Department of Justice, *The Criminal Law in Canadian Society*, Ottawa, 1982.

² *R. v. Keegstra*, November 5, 1984 [unreported] (Alta Queen's Bench).

³ *Ibid.*, at 22.

⁴ *Ibid.*

⁵ *R. v. National News*, 1957, 118 C.C.C. 152 (Ont. Ct. of Appeal).

Chapter 21

Canada Customs

Our recommendations are divided into two categories, legal and administrative.

1. Legal

Recommendation 17

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into the list of goods prohibited entry into Canada by Schedule C of the Customs Tariff and incorporated by reference into the Customs Act.

We are of the view that our description of proscribed pornographic material in the *Criminal Code* should be incorporated by reference in all other federal legislation which attempts to regulate such material. It will be essential to do so if we are to achieve the kind of concerted and consistent regulatory effort needed to deal with pornographic material. There must be a common understanding of what kind of material should be regulated and controlled.

As we have indicated in the course of our discussion of the Customs legislation in Section II, chapter 9, the existing qualitative words used to describe the character of what pornographic material is to be regulated by Customs, are "immoral or indecent". We want to be careful to point out (as we have in other areas), that while the incorporation of our *Criminal Code* recommendations concerning proscribed pornographic material into Customs legislation will more clearly define the material for those who are asked to classify it, our recommendations deal only with material that contains some kind of sexual activity. They do not extend to those materials which are, for example, violent and/or disgusting, but lacking in any depiction or description of sexual activity. The possibility exists that this kind of material is covered by the present description of "immoral or indecent" in *Tariff* item 99201-1. The short point is that the simple exchange of our criminal law recommendations with respect to pornographic material for the words of the present *Tariff* item, will leave out material that Canadians or their government or their regulators may want to prohibit from entry into Canada.

Recommendation 18

If, in administering the Customs Tariff, it becomes necessary for Customs to formulate descriptions of pornographic material more precisely than do our Criminal Code recommendations, Customs should put such formulations in the form of Regulations rather than internal policy guidelines or memoranda.

In order to better administer the *Tariff*, Customs may wish to formulate more precisely or more comprehensively descriptions of pornographic material. We do not think, however, that such formulation should be put in the form of policy guidelines or interpretive intra-departmental memoranda. We think, instead, that Customs should pass Regulations for posting at all regional offices. The Regulations should also be available to interested members of the public upon the payment of an appropriate fee. In our view, Regulations should be passed only after they have been published as proposals seeking public comment. This practice has been used to advantage by other regulators (notably the Canadian Radio-Television & Telecommunications Commission) as a useful vehicle to obtain public involvement and response.

Regulations can, of course, be amended if practice and experience requires. The fact that the contents of Regulations are public and easily accessible will help to ensure that interested members of the public are informed and appropriate pressure can be brought to amend the Regulations when necessary. The same advantages do not exist with respect to intra-departmental guidelines and memoranda.

Recommendation 19

The Criminal Code should be amended to provide that it be an offence to import into Canada pornographic material proscribed by the Criminal Code.

For the reasons that follow, we have concluded that it should be a criminal offence to import certain kinds of pornographic material. We point out that if our recommendations with respect to inclusion in the *Criminal Code* of various kinds of pornographic material are accepted, the offence of importing should extend only to that material that is proscribed, not the material that is regulated in terms of display and its availability to children.

Under the current regime, an importer of goods who is prepared to seek Customs clearance faces no risk if the goods are declared to be prohibited. The consequences of such a declaration are that the goods are returned to their source or are destroyed if abandoned by the importer.

It is only when an importer brings in goods which he fails to declare that a risk of criminal sanction arises under the *Customs Act* and the *Customs Tariff*.

As we have indicated in the chapters of this Report that describe the sources of pornographic material, it is clear that the vast majority of it comes from outside Canada. Under the present state of the criminal law, there is no real disincentive to the flow of material into Canada. It seems clear that the existing sanctions are, and will continue to be, inadequate to stop this flow.

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The parallels between the pornography and the narcotics industries are compelling. The law has acted to attempt to address the problem of narcotics at the point where the material enters the country.¹ The sanction that the criminal law places on the act of importing narcotics has, in the opinion of many law enforcement officials, acted as a deterrent and has done much to stem the tide of narcotics. For some of the same reasons, we have considered the suggestion that the *Criminal Code* be amended to make it an offence to import the worst kinds of pornographic material into Canada.

The first concern that arises in making the importation of pornographic material an offence, is that by doing so we would be putting a premium on the material that is then produced in Canada. It would be a cruel irony if the result of creating the offence of importing pornographic material was to develop a domestic production industry. While we are sure that production would undoubtedly increase in Canada, we think that there are some factors which would confine that increase. Firstly, law enforcement authorities could anticipate the increase and tailor their efforts to respond to it. Pornographic material has caused sufficient concern within the country that producers cannot count on the apathy of either the public or law enforcement officials to insulate them from investigation and detention.

Secondly, the consumers of pornography are used to being able to acquire a product that is technically well produced. We assume that it would, therefore, take considerable investment to match the product that has traditionally been reaching the marketplace in Canada. That investment would, of course, be at risk upon detection.

Additional concerns arise when considering what defences could arise to a charge of importing. For example, should the mere fact of a Customs clearance be a complete defence?

On the basis of what we know of the operations of Canada Customs, it is clear that a huge volume of pornographic material goes undetected. We know that large shipments can be checked only randomly and that the illegal material could easily be secreted within a shipment of other goods. We also know that the largest portion of imported goods is cleared without any inspection whatsoever.

In these circumstances, we think that the simple fact of a Customs clearance should not be a complete defence to a charge of importing. We do think, however, that the fact of Customs clearance should be taken into consideration in order to determine whether the accused had the necessary guilty intent to commit the offence. For example, there is a great difference between the situation where Customs clearance is given under some mistake of failing to detect the material, and the situation where the material is specifically brought to the attention of a Customs officer and wrongly cleared. In the latter situation, the circumstances under which the clearance was sought and received would obviously be helpful in determining the intent of the accused.

Our criminal law provides that where there is a substantive offence, it will also be illegal to attempt to commit the substantive offence. This raises some further concerns about making importing pornography an offence. Should there be a conviction for attempting to import in those cases where a person declares pornographic material and the material is denied entry? Surely not. The attempt to commit the offence would, however, be complete if a person secreted pornographic material or attempted to enter the goods without proper disclosure.

Taking everything into consideration, we conclude that the *Criminal Code* should be amended by making it an offence to import proscribed pornographic material. It would be open to the Crown to proceed by indictment or summary conviction. The maximum penalty should be two years imprisonment.

Recommendation 20

Judges should be entitled to consider at the time of sentencing a person convicted of dealing in one manner or another with proscribed pornographic material that the person disclosed to law enforcement officers the source of the material in question.

In our discussions with Customs and law enforcement officials, it became clear that information about the source of pornographic material is almost impossible to come by. Yet it is obvious that such information would considerably assist in the effort to control the importation and sale of proscribed or prohibited material. As a way around this difficulty, at least partially, it was suggested to us that the law should somehow oblige a person under investigation for dealing in one way or another with pornographic material to reveal the source of that material.

The objective of such an obligation would clearly be a desirable one. However, there is both a philosophical and a practical reason why, in our view, these suggestions cannot be acted upon. On the philosophical level, there is the concern that the imposition of such an obligation would conflict with the fundamental principle of our law, that persons cannot be compelled to make statements that might tend to incriminate them. If the source of the prohibited material was located in another country, identification of that source by either an accused or a convicted person would indicate that they had imported prohibited goods contrary to the *Customs Tariff* (or, if our third recommendation above were implemented, that they had imported prohibited material). While it is possible to provide that the information given could not be used in subsequent proceedings against the persons giving it, that would likely prove to be of little solace to them. On the basis of the information provided, the Crown might well be in a position to uncover other evidence that is admissible against them and convict them on that basis.

On the practical level, there is the obvious concern that the information given might be false or misleading. Or the person may genuinely not know or be able to identify the person from whom the material was obtained.

We believe that the only viable recommendation that we can make on this matter is that judges be encouraged to take into account at time of sentencing, the fact that the accused disclosed the source of the material. Prosecutors and judges alike would have to be careful that the accused did not mislead them, but if the information can be verified or if there is reason to believe that it is accurate, it seems to us appropriate that the accused should benefit to some extent from his willingness to disclose the information.

2. Administrative

The Customs Branch has a complex administrative responsibility. The volume of tariffs, procedures, clearances and sheer paper is enormous. The administration of Customs is further complicated by the fact that it is a national service in a huge country that depends heavily on trade. Canadians are among the most voracious consumers in the world and are proud of their reputation as a sophisticated trading nation. Our demand for goods is consistently high and with it comes corresponding demands on the Customs service.

We do not make these observations as an apology for Customs, but in order to indicate that by the nature of the function they have to perform, Customs is vulnerable to criticism. In one sense, Customs is something of an institutional scapegoat.

Our mandate has not been to conduct an exhaustive study into the administration of the Customs service. Certainly, we have not been able to do so. We have, however, had the chance to meet with Customs officials to ask specific questions about aspects of their service that relate to prohibited goods.

We hope that our suggestions are informed and will not be seen to be gratuitous. Most of our observations and recommendations arise from meeting with Customs officials and observing the process followed by Customs officers.

Recommendation 21

The federal government should give higher priority than it now does to the control of the importation of pornography.

In the discussion of the enforcement of Customs legislation, we noted our impression that the inability of Customs to stem the flow of pornography into Canada was due, in part, to the lack of political will. We were advised that greater emphasis has been given by the federal government to the enforcement of the rules and regulations that apply to automobiles and clothing than to the enforcement of Tariff Item 99201-1.

This ordering of priorities is, in our view, unacceptable. Surely it is more important to prevent the entry into Canada of a number of magazines that offend Tariff Item 99201-1 than it is to ensure that an article of clothing reveals its place of origin.

Ideally, the Committee would like to see additional staff taken on by Customs to improve the level of enforcement of Tariff Item 99201-1. Given the current government's program of restraint in government spending, that may not be realistic, however. If that is the case, then personnel and other resources that are now employed in other areas, should be transferred to those departments that have primary responsibility for the enforcement of Tariff Item 99201-1.

Ineffective enforcement of Customs legislation in this area is of particular concern, given that a very high percentage of the pornographic material available in Canada comes from other countries. Many of the people who appeared before us were clearly frustrated by the lack of success that Customs was, and is, having. The recommendation we make should assist in alleviating at least some of this frustration.

Recommendation 22

The basic 1977 policy guidelines on the interpretation of prohibited goods should be immediately revised to contain more precise and contemporary formulations of characteristics which must be present to make materials "immoral or indecent".

The very language used in the current policy guidelines (which are reproduced in the text) indicates the need for reform. The terms presently used in the guidelines reflect a dated notion of the kind of pornographic material that is widely available for distribution. We are aware that the Customs Branch agrees that the guidelines should be reformed and is in the process of doing so.

It is convenient to repeat here the views we expressed earlier about the advantages of using Regulations to give contemporary meaning to statutory language. The publication of proposals prior to the passage of Regulations will undoubtedly allow Customs to benefit from the public's notion of what Canadians currently think should be prohibited as immoral or indecent.

Recommendation 23

The jurisdiction to clear film and video recordings for importation into Canada should remain with Canada Customs. The jurisdiction to classify film and video recordings for sale or rent or public showing should remain with the provincial film classification boards.

Recommendation 24

Co-operation between Customs and provincial film classification boards should continue in order that the classification of film and video recordings can take place as part of a single, integrated administrative procedure.

Recommendation 25

Film or video recordings referred by Customs to provincial classification boards should remain in the continuous control of both agencies until the classification and clearance process is complete.

In Section II, Chapter 14, we have discussed the various reasons which led us to recommend that jurisdiction to classify film and video recordings should

continue to reside with provincial film classification boards. Some of the reasons have to do with the distinctively Canadian issues of culture and language, and others have to do with the immediacy of a relatively local classification system, when compared with what would likely be seen as the remoteness of a national system.

We think that most Canadians want to be able to hold any classifier to account for the decisions that are made. The reasons a classifier may give are perhaps better appreciated when explained in the specific locality where a film or video recording is actually to be shown or sold.

We think the present system of administrative co-operation between Customs and provincial classification boards should be nurtured and continued, and that it serves a useful purpose for the viewing public, the distributors of film and video recordings and, indeed, for Customs and the classification boards.

In order to prevent the possibility of allowing the entire Customs inspection system to be frustrated by the unauthorized copying of material pending ultimate Customs clearance, we conclude that film and video recordings to be classified should remain in the control of Customs until the clearance process is complete.

Specifically we think that the practice followed in Québec of allowing an importer to have custody of the material for classification should be stopped.

Recommendation 26

The management information services of Customs should be upgraded to provide an adequate central data base and the ancillary systems necessary to capture, store and retrieve information relating to the importation of prohibited material into Canada.

Recommendation 27

Customs should be adequately equipped to fulfill its responsibilities in contributing to the information flow required for an effective interface between the resources of Customs and law enforcement agencies.

As we have indicated in the preceding text, the current information system used by Customs is woefully inadequate. The Customs inspection system is highly decentralized and the information gathered from the system is disparate. Customs lacks even an adequate central data base. The information that does exist is difficult to put into the system and time-consuming to retrieve. Commodity specialists and other Customs officers given the responsibility to clear goods, are daily being asked to make quick and consistent decisions to determine if goods are prohibited by the *Tariff*. At the moment, they are simply not equipped to efficiently do so.

The immediate consequence of this lack of information resources is delay and inconsistency. The ultimate consequence is the inability of Customs to contribute appropriately to the other highly integrated gathering systems being

put in place by law enforcement agencies. If there is to be any really effective overall Customs enforcement in the area of prohibited goods, Customs must immediately acquire dedicated "on-line" information resources. Before Customs can be expected to give needed information to companion agencies such as the RCMP, it must be able to inform itself about its own operations.

Recommendation 28

Customs should investigate the practicality of charging appropriate fees for the filing and hearing of appeals from classification decisions.

As one method of helping to finance the kind of information mechanization that Customs requires, fees could be charged for the filing and processing of appeals. We think the fees should be set at a level that realistically attempts to compensate Customs for the administrative costs it sustains as a result of processing appeals. We do not think that the level of fees should be so unreasonably high as to frustrate the bringing of appeals.

We have no adequate way of knowing the likely cost of collecting such administrative fees. It may be that the costs involved would make our recommendation counter-productive. We simply suggest that Customs investigate the possibility of recovering some of its administrative costs so that more resources could be dedicated to the capital expenditures necessary to better equip the Customs Branch and to perform some of its clerical functions.

Recommendation 29

Customs, as part of a combined project to be undertaken with the Department of Communications and the CRTC, should examine the Customs implications involved in trans-border telecommunication of pornographic material.

None of the members of the Committee has a technical background and we are not equipped to assess the kind of sophisticated technological information that we received from time to time about trans-border telecommunications. We were told that the technology exists to transmit pornographic material by means of telecommunication so that pictorial material could, for example, be transmitted electronically from the United States and be reproduced in Canada. The best analogy we can think of is the telex equipment most people are familiar with.

We do not make this recommendation to promote speculation about state-of-the-art methods to transmit pornographic material, but rather to indicate that this technology appears to be the next generation to the well known telex and telecopier machines many people have in their offices. The transmission of information in the way that has been described could, of course, completely bypass the existing scheme of Customs inspection. One of the challenges Customs faces in the next decade will be to determine how to manage and control material transmitted by technology.

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¹ Section 5 of the *Narcotic Control Act*, 1960-61, c.35, provides:

(1) Except as authorized by this *Act* or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years.

Chapter 22

Canada Post

Earlier, we reviewed the overlapping and, to some extent, competing jurisdictions of the Customs and Postal services. We have no desire to enter the controversy about what international mail Customs can or should inspect. In any event, the controversy would appear to have been resolved. The agreement that Customs may inspect mail weighing more than 30 grams is awaiting legislative confirmation when the proposed new *Customs Act* is reintroduced in Parliament.

Our recommendation is addressed to the level of co-operation that must necessarily exist between the two services and the RCMP if there is to be an effective overall effort to control prohibited goods sent to Canada by mail. As we have recorded earlier, Customs and the RCMP are exchanging information and now supply information to a common data bank. This quite recent development is really just an extension of the other formal arrangements that have been made with respect to a division of responsibility for investigation and enforcement under the Customs legislation. The relationship between the Customs Branch and the RCMP appears to be comprehensively structured and well managed.

The same cannot be said about the involvement of the Postal service. It appears to have adopted a completely passive role. No priority has been assigned to the investigation of the transport of pornographic material in either the domestic or international mail. It appears that the postal service has been content to allow Customs and the RCMP to assume complete investigatory and preventative roles. The best information that we have is that while the postal service is provided with available compiled data by the RCMP and Customs, the flow of information is entirely one way. This apparent disinterest seems to be unique to Canada. While we have no comprehensive knowledge of the subject, it appears that in both the United States and countries in the Commonwealth there is an integrated co-operative effort involving Customs, the Postal service and the appropriate law enforcement agencies.

Recommendation 30

The Postal service should assign policy and administrative priority to the effective control of distribution of pornographic material by mail. We further

recommend that the postal service actively participate with the RCMP and the Customs service in gathering and exchanging information and data in an effort to better co-ordinate effective investigation and enforcement techniques to control the distribution of pornographic material by mail.

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Chapter 23

Broadcasting and Communications

Our recommendations relate to aspects of the policies and procedures followed by the CRTC and to initiatives which Canada should be taking nationally and internationally.

Recommendation 31

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into Regulations passed or to be passed by the CRTC pursuant to the Broadcasting Act with respect to all broadcast media.

We point out that we are referring in this recommendation, only to the pornographic material that is proscribed under tier 1 and tier 2 of our proposed *Criminal Code* amendments and not to the material that is simply limited by display.

This recommendation raises two points, one large and one small. The small point is this: at present, the Regulations for AM and FM Radio Broadcastings, and publicly broadcast television, prohibit the broadcast of "anything contrary to law" and any obscene language or pictorial presentation. Accordingly, the broadcast of any material that violates the *Criminal Code* would constitute a breach of the CRTC's Regulations and could lead to the Commission imposing sanctions. As we have already pointed out, the same prohibitions do not appear in the Pay Television Regulations. In our view, the prohibition must appear in these Regulations if the Commission is to be able to move against a licence in the event of a breach of the criminal law.

Perhaps the reason for the omission has to do with the fact that pay television is a limited specialized subscriber service. Or, perhaps the reason for the omission has a great deal to do with the confused state of Canada's obscenity laws. If it is the former, we can see no valid reason to allow the broadcast of any illegal material on any media. If it is the latter, we think our recommendations with respect to what material will be illegal under the *Code* will help to bring the necessary certainty to the law.

In any event, we are of the view that the pay television Regulations should be amended so as to conform with the Regulations that have been passed with respect to free public radio and television broadcasting.

In the result, pay television broadcasters would face precisely the same consequences as all public broadcasters face if they choose to broadcast illegal material.

The larger point that is raised by this recommendation is that if our proposed *Criminal Code* amendments to proscribe pornographic material are incorporated by reference into the existing broadcast Regulations, the utility of the existing Regulations prohibiting obscene or indecent language or pictorial representation will have to be re-examined. Our recommendations covering proscribed pornographic material apply to material that depicts some kind of sexual activity. Material that is violent or disgusting but which has no sexual aspect to it, is not proscribed by our recommendations. If this material is to be prohibited from broadcast, the Regulations to the Broadcasting Act will have to be appropriately redrawn.

Recommendation 32

Canada should take the initiative to immediately open discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.

It would be entirely inconsistent for Canada to regulate pornographic and/or abusive programming domestically and do nothing about the regulation of such programs when they are received in Canada, but originate in another country. We can understand the important principle of national sovereignty and we are convinced, therefore, that any such international regulation will be achieved only as a result of agreement between sovereign countries. The most pressing need is for discussions to begin with the United States. Both countries have experience with comprehensive domestic regulation and both countries must surely understand the urgency for joint action to regulate pornographic program content. Both countries are members of INTELSAT, the global satellite system. We hope that Canada and the United States will jointly sponsor discussion of this issue in that international forum.

Recommendation 33

The CRTC should conduct the appropriate research into and promote appropriate public discussion about technology capable of scrambling and descrambling satellite signals, in order that there can be a measure of practical control over the transmission and reception of satellite signals.

We hope that the international regulation we speak of in our Recommendation 32 will not be too long in coming. However, the issue of the reception of satellite signals that contain pornographic material is too urgent to remain untreated pending an international agreement on regulation. In the meantime, we agree with the private views expressed by the Chairman of the CRTC and quoted earlier. We hope the CRTC will help to facilitate necessary further technological research in this area. The Commission's mandate under the *Broadcasting Act* includes the following power:

18.(1) The Executive Committee may undertake, sponsor, promote or assist in research relating to any aspect of broadcasting and in so doing it shall, wherever appropriate, utilize technical, economic and statistical

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the Government of Canada.

If it is determined that there is an affordable technological method
whereby those who own satellite antennas can prevent the reception of
unwanted signals, we are sure the Commission will make that fact well known.
We have no doubt, based on the submissions that have been made to us, that a
large number of Canadian parents hope that such technology will be available
to protect their children from unwanted and intrusive pornographic broadcast-
ing.

Recommendation 34

Upon the issuing or renewal of a broadcast licence, a licensee should be
required to post a bond in an appropriate amount to ensure compliance with
the Regulations and conditions of licence relating to program content. In the
event that a complaint about program content is upheld by the CRTC, the
Commission should have the discretion to compensate the complainant for
the costs incurred in presenting the complaint, such costs to be paid the
licensee and secured by the aforesaid bond.

As we have mentioned, the CRTC cannot and does not monitor all
programs either by way of pre-clearance or by way of on-air observation.
Concerned members of the public may, therefore, decide that it is in the public
interest to have programs monitored. Such an effort may well be required to
properly document a complaint to the Commission, particularly if the
complaint relates to some systematic behaviour by a licensee.

In our view, a successful complainant should be compensated (not
rewarded, but compensated) for the reasonable costs involved in accumulating
and presenting the necessary evidence. In addition we think that the reasonable
hearing costs of the successful complainant should be paid.

We do not think that these costs should be paid by the public.

We think that the licensee against whom the complaint has succeeded
should be obliged to pay the costs of the complaint.

In order to make the proposal work, the Commission must be given the
jurisdiction it now lacks, both to award costs and determine their amount. Such
jurisdiction can only arise upon amendments being made to the appropriate
legislation.

As security for the payment of costs, all licensees could be required by the
CRTC to post a bond or equivalent security or other financial instrument at
the time a licence is issued or renewed. The posting of such an instrument
would prevent the penalty that would clearly arise if a licensee was required to
post a cash amount.

In any civil litigation the successful party is entitled to some compensation
for costs. In quasi-judicial situations a system of compensation for costs is also
well-known. Although the analogy is not perfect, human rights commissions in

Canada have the power to award costs. The various commissions actually provide the facilities and the staff for a complainant to pursue a remedy. If the complainant makes use of these facilities, costs will not be awarded to a successful complainant. If, however, the complainant obtains private counsel, costs may be awarded in the discretion of the tribunal. If the commission is of the view that the complaint was frivolous, it can award costs to a respondent.

In the case of complaints to the CRTC, it might well be argued that the Commission should have the jurisdiction to award costs to a licensee who has been successful in defending a complaint. However, it must be remembered that the Commission has the discretion to decide whether a complaint will proceed and whether there should even be a hearing. In these circumstances, we think that it is sufficient to give the Commission the power and the discretion to award costs only to the complainant.

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Chapter 24

Human Rights Approach

1. Introduction

There was considerable interest expressed at the Committee's hearings in treating pornography as a human rights issue. Proponents of this approach did not, for the most part, make detailed proposals about how this might be accomplished in the Canadian context. Their submissions, however, stressed a number of interrelated themes.

The first such theme emerges from the endorsement of the concept of pornography as defined by Helen Longino, Andrea Dworkin and others. Pornography is seen as involving, and may indeed inspire, the hatred of women. It is a powerful part of society's repression of women. As such, it is seen as an evil which limits the full human rights and dignity of women and, correspondingly, as an evil most appropriately attacked by means of the legislation already existing in our society to further human rights and dignity. Hence the call to use human rights legislation, and the enforcement mechanisms of human rights commissions, to attack pornography.

Proponents of the human rights approach cite as the best example of use of this method the by-law drafted by Andrea Dworkin and Catharine MacKinnon. Proposed for the City of Minneapolis and later enacted in Indianapolis, this by-law has a number of features which bear examination.

The by-law explicitly states that pornography is a form of discrimination on the basis of sex. The rationale for this characterization is spelled out in the by-law: pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women; the bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment and almost all other areas.¹ The framers of the by-law, Andrea Dworkin and Catharine MacKinnon, maintain in fact that the influence of pornography over the ages on the men who rule societies has contributed to the development of misogynist (women-hating) social

institutions. Only now, however, that changes in technology and the market have made pornography widespread have we begun to understand its impact.²

The Indianapolis by-law articulates one of the city's objectives as "to prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography".³ The by-law is specifically directed at three distinct activities: trafficking in pornography, coercion into pornographic performances, and forcing pornography on a person.

With regard to trafficking, the by-law provides that the production, sale, exhibit or distribution of pornography is discrimination against women by means of trafficking in pornography, and gives to any woman a cause of action under the by-law "as a woman acting against the subordination of women." Any man or transsexual who alleges injury by pornography in the way women are injured by it is also given a cause of action.⁴ The formation of private clubs or associations for purposes of trafficking in pornography is illegal.⁵ This cause of action is the most far-reaching in the by-law. The position is that the public availability of the pornography, as defined in the ordinance, is in and of itself a violation of women's rights to equal personhood and citizenship. It would seem that a remedy would be available on the mere showing that the pornography is within the definition in the by-law, without a further showing of damage personal to the complainant.

Any person who is coerced, intimidated or fraudulently induced into performing in pornography is given a cause of action against the maker, seller, exhibitor, or distributor of the pornography for damages, and for the elimination of the products of the performance from public view.⁶

Any person, who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action against the perpetrator or institution.⁷

In addition to these three provisions, the by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography a cause of action for damages against the perpetrator, maker, distributor, seller, and exhibitor, and for an injunction against further exhibition, distribution or sale of the specific pornography.⁸

The by-law contemplates that the person may assert these causes of action in either of two forums. The municipal Office of Equal Opportunity is empowered to receive a complaint. Once the complaint has been filed, the by-law provides for an investigation, and for an informal conference in an effort to eliminate such practice if there is reasonable ground to believe that a breach has occurred. If the complaint is not resolved informally, the Complaint Adjudication Committee may hold a public hearing. The board may seek judicial enforcement of its decision if a respondent fails to comply with it. Recourse to the courts also arises in another way. The complainant may seek temporary equitable relief through the courts upon the filing of a complaint.

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2. The Canadian Context

It is worthy of note that some of those who supported the idea of a civil remedy for pornography appeared to do so as much for procedural reasons as for the substantive ones on which the Indianapolis by-law is based. The Committee received complaints that police or Crown Attorneys were refusing, for various reasons, to bring charges in connection with material considered obscene by citizens. The Crown's decisions not to prosecute are difficult to circumvent. They cannot be reviewed by a court, and may for practical purposes be difficult to reverse by means of political pressure.

There are difficulties in bringing private prosecutions. They may be stayed by the Crown with no opportunity for the person bringing the prosecution to have the Crown's decision to enter a stay legally reviewed. Other cases may require investigative and financial resources beyond the reach of many. The burden on the private prosecutor is the same as the burden imposed upon the Crown, proof of guilt beyond a reasonable doubt.

In a civil action, proceedings are not dependent on the Crown's volition: the parties themselves have control of the matter. The standard of proof is not nearly so high. Instead of proof being established beyond a reasonable doubt, the case need be proven only on a balance of probabilities. It must be acknowledged, however, that those who proceed with civil actions face the need to pay legal bills, not only for their own counsel, but also for the opposing party should the action be unsuccessful. However, it is thought that involvement of human rights commissions where complainants are not required to pay legal costs, may alleviate that particular disadvantage.

Evaluating the usefulness of the civil action approach in the Canadian context thus requires a consideration not only of the important substantive issue raised by its proponents, but also of the features which make it attractive from a procedural point of view.

Before assessing the civil action option from both of these points of view, we review briefly the availability in Canadian law of recourse like that set out in the Indianapolis by-law.

2.1 Canadian Law

In Canadian law, recourse for some of the harms attacked in the Indianapolis by-law may be available, but with two important differences from the by-law. Firstly, the recourse may be somewhat indirect, compared with the straightforward spelling out of remedies in the by-law. Secondly, problems of proof of harm will in many cases be more difficult in Canadian law than is contemplated in the by-law. Some examples are outlined here.

Take, for instance, the relief conferred by the by-law for someone coerced, intimidated or fraudulently induced into performing in pornography. In

Canadian law, it may well be possible for someone in this position to sue for damages for fraudulent misrepresentation, or for defamation. In an appropriate case, the court may be prepared to grant an injunction to stop the publication or distribution of the material complained of. Depending on the circumstances, criminal charges may be brought against the person wrongfully bringing about the participation in pornography.

The Indianapolis by-law, however, contains a number of stipulations withdrawing certain defences to an action for wrongfully involving a person in the production of pornography. Among the possible defences withdrawn are: that the person actually consented to a use of the performance that is changed into pornography; that the person knew that the purpose of the acts or events in question was to make pornography; that the person demonstrated no resistance or appeared to co-operate actively in the photographic sessions or in the sexual events that produced the pornography; and that the person signed a contract, or made statements affirming a willingness to co-operate in the production of pornography.⁹ Doubtless it is the withdrawal of these potential defences which makes this aspect of the by-law attractive to its proponents, for each of these defences is open to abuse by an unscrupulous person who is truly manipulating another into appearing in pornography.

The Indianapolis by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography, a cause of action for damages against its perpetrator, maker, distributor, seller and exhibitor. It is not unlikely that, even without such a by-law, this type of action might succeed if brought in Canada. The person suffering such damage could bring a civil action. Depending on the facts of the case, the victim could allege either that the infliction of harm was intentional, or that it resulted from negligence on the part of the party being sued. The potential of bringing this type of action was raised during the public hearings. It was pointed out that negligence concepts are now being extended to situations where, for example, a tavern keeper who knew a customer was too drunk for safety but allowed him to depart the premises was held responsible for damages arising when the customer was hit by a car on the side of the road.¹⁰

The difficulties involved in pursuing an action for damages for harm caused by pornography would be primarily ones of causation and proof. It would have to be established that the injury was caused by the pornography. We have been told during our hearings of two kinds of cases where this might be possible. Workers from shelters for battered women report being told by some clients that their male friends or spouses required them to participate in acts of violence imitating images seen by the men in pornographic magazines. Some cases of violent crimes against women where the perpetrator was found to have a supply of violent pornography were drawn to our attention. In either type of case, assuming that the facts could be proved, it may be possible to bring this type of action.

Of course, a typical defence might allege that a different cause altogether was responsible for the actions; in the case of a psychopathic-type murder, for

example, the murder might be the result of negligence on the part of the victim, or the victim might be contemned by the public, or the victim might be involved in a dispute between two parties. Part. 11

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example, an accused who had manufactured pornography would likely advance the murderer's mental condition as the direct cause of the crime. The negligence action might face another hurdle, that of establishing that in law, the victim or potential victim of pornography should have been in the contemplation of the defendant. Establishing such a proposition might well involve canvassing in court the substantial experimental literature on the links between pornography and violence discussed in Section I, chapter 6 of this Part.¹¹

All in all, however, it can be said that there is little in the Indianapolis by-law itself which would eliminate problems like the foregoing in an action brought pursuant to the by-law. To that extent, it may be said that the position in Canadian law is comparable to that explicitly provided for on this point by the by-law.

A provision of the by-law which has caused great interest in Canada is the action for damages and injunctive relief which may be brought by any woman complaining of trafficking in pornography. The proceeding does not require a showing of actual harm. Upon proof that the material is within the definition of pornography, it is taken that the harm is made out. Thus, it can be said that the by-law confers a private cause of action to restrain or redress a public wrong. The possibility of using human rights procedures in this fashion has prompted considerable interest in Canada.

It should be pointed out at this point that using the private action to redress a public wrong has not, until now, been a prominent feature of Canadian law. It is the Attorney General who must ordinarily sue to redress a public wrong. An individual who seeks to act in this fashion must secure the Attorney General's permission so to proceed, and the Attorney General's decision to grant or withhold such permission will not be reviewed by the courts.¹² Only if the individual has suffered some personal harm above that which has been sustained by members of the public generally can he or she proceed with a private action without official permission.

In fact, it is rare that even the Attorney General will proceed against a public wrong by way of a court action. Ordinarily, the recourse for public wrongs is by way of the criminal law, or a proceeding under the appropriate regulatory statute.

We think that a lot of the interest in the Indianapolis by-law approach really derives from Canadians' dissatisfaction with the administration of the criminal law relating to pornography. The ability of any private citizen to set in motion the legal process was frequently mentioned as an attractive feature of the by-law approach. To the extent that deficiencies in the criminal law, be it administration or substance, have prompted the recommendation to emulate the Indianapolis approach, we prefer to address directly the deficiencies in the criminal law rather than create a new form of civil action to redress a public wrong.

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as that taken by the Board of Inquiry. Should this approach be followed by the Saskatchewan Court, the Board's decision may well be upheld.

In light of the position taken by the Court in *Keegstra*, there is some reason, indeed, to hope that a human rights statute like the Saskatchewan one will not suffer, in Canadian constitutional law, the same fate as did the Indianapolis by-law in the United States District Court. In a decision rendered in November, 1984, Judge Sarah Evans Barker declared the Indianapolis by-law to be invalid.¹⁵ Among the major reasons for the decision was the position in American constitutional law that only "obscene" speech falls outside the protection for freedom of expression conferred by the First Amendment. Where laws impinge on speech that is not obscene, the state must show that they serve a compelling state interest, which is equivalent to the interest served by the First Amendment. Otherwise, the law will be unconstitutional.

Judge Barker held that the type of images prohibited in the Indianapolis by-law went beyond the legal definition of obscenity, a concept that is founded on the ideas of sexual prurience. In justification of the incursions into the area of so-called "protected speech", the city argued that the by-law served the compelling interest of protecting women from discrimination. This argument was rejected, largely on the basis of the moderate level of protection which has traditionally been afforded in American constitutional law against gender-based distinctions in law.

In Canadian constitutional law, we suggest, the *Charter of Rights* makes it clear in sections 15 and 28 that equality of women is a strongly protected value. Mr. Justice Quigley's analysis on this point, focusing on section 15 as a counterbalance to section 2, is, in our view, to be preferred in the Canadian context to the reasoning of Judge Barker.

This Committee was urged to recommend that provisions along the lines of the Saskatchewan hate literature provision be included in other Canadian human rights codes. We have considered the recommendation carefully, because we find attractive the rationale underlying the Saskatchewan decision. Pornography is, to our minds, an offence against human dignity and the guarantee of equality.

We have reservations, however, about the appropriateness of including a remedy aimed specifically at pornography solely within the jurisdiction of human rights commissions. These reservations stem in large part from our concerns about the nature of the commissions' process.

Typically, the receipt of a complaint initiates a process of investigation by a Commission. Most human rights commissions have a statutory obligation to attempt conciliation of a complaint before proceeding to the stage of a formal hearing. Until the complaint reaches a formal hearing stage, it can be expected that there will be little or no publicity from the commission about the issues or the progress of the case, since the investigation and conciliation phases are

characterized by obligations of confidentiality. Often, the investigation and conciliation phase will be long. The *Red Eye* complaint, for example, was initiated in July of 1980. It was not until September, 1981 that the Board of Inquiry which would hear the complaint was named. The Board's decision emerged in March, 1984. The offending issues of the *Red Eye* had been published in 1979 and 1981. If the commission takes the view that the complaint should not lead to a public hearing, the complainant has limited recourse.

These disadvantages in the human rights procedure may well be balanced against its perceived advantages to the complainant, namely, that the commission bears the cost of the proceedings, and that anyone by making a complaint can oblige the commission to take some sort of action. One must also bear in mind, however, the negative aspects of even these perceived procedural advantages. Human rights commissions often experience difficulty in receiving enough funding to meet the demands placed upon them. In our view, one must consider carefully the financial implications of adding to commission jurisdiction a ground of complaint that may produce substantial numbers of new cases. Not only the ability to service the new caseload, but also the possible jeopardy to the commission's ability to meet existing demands upon it should be considered.

Given the interest in this issue and this remedy shown in our public hearings, the volume of material which is felt to be offensive, the relative ease of launching a complaint and the dissatisfaction with the responsiveness of existing enforcement authorities, we predict that there may be frequent resort to the human rights jurisdiction. The influx of new cases could have quite serious implications for commission funding. Unfortunately, the current climate of fiscal restraint in government circles has affected human rights commissions and other social agencies. One has little cause to hope that even a wave of anti-pornography popularity could provide enough new revenue to allow both the new and existing caseload to be serviced.

A further difficulty with the commission process has a serious bearing on the suitability of a commission to handle pornography complaints. Human rights commissions cannot give interim relief. They could not, for example, prevent the distribution of a particular publication pending resolution of a complaint, or take other similar steps to meet a crisis in the short-term period while a complaint was being processed. Much pornography about which persons will likely complain is contained in magazines with monthly issues. Thus an offending issue could be widely distributed, to the considerable enrichment of its publisher and wholesaler, long before a resolution of the complaint had been effected. By the time the remedy had been decided upon, the consumers of the original material could well have forgotten it, so that any retraction or apology would be almost totally meaningless. The court's process, on the other hand, offers the possibility that effective pre-trial measures would be available in a proper case, to take the material out of circulation immediately.

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Given these concerns, we refrain from urging that provisions like subsection 14(1) of the Saskatchewan *Code* be inserted into all human rights legislation. We do, however, believe that it would be most beneficial for human rights commissions to explore vigorously the application of their existing legislation and jurisprudence to pornography issues. The application of the existing employment jurisprudence to control the presence of pornography in the workplace has already been mentioned. So, too, has the need to develop the same kind of approach in the area of services and facilities. In our view, it is important that commissions become active in putting issues concerning pornography on their existing agendas, but we are not confident that they will be able to handle a large number of complaints basically unrelated to their traditional areas of endeavour. The requirement of handling complaints arising from the large numbers of periodicals with pornographic content, or which people think have pornographic content, would, in our view, seriously overbalance commissions without producing much useful or timely resolution of issues.

Recommendation 35

Human rights commissions should vigorously explore the application of their existing legislation and jurisprudence on pornography issues, including exposure to pornography in the workplace, stores and other facilities. However, we do not recommend that a separate pornography-related offence be added to human rights codes at this time.

We believe that a good alternative to the use of human rights commissions as adjudicators of pornography issues can be brought into existence reasonably expeditiously. We recommend that jurisdictions enact by legislation a civil cause of action focusing on the violation of civil rights inherent in pornography. There now exists in Canadian law at least a partial model for such a cause of action. The *Civil Rights Protection Act, 1981*,¹⁶ of British Columbia, creates a class of "prohibited acts". In subsection 1(1) of the *Act*, "prohibited act" is defined as "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

- (a) hatred or contempt of a person or class of persons, or
- (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
on the basis of colour, race, ethnic origin or place of origin."

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of persons, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

It may actually be possible to use this act now as the basis for an action against pornography featuring demeaning racial stereotypes. Examples of such material were presented to the Committee during the public hearings; it is certainly within the bounds of possibility that it could be held to promote

hatred or contempt of a person or class of persons or the inferiority of that person or persons in comparison with another or others.

Recommendation 36

Legislation along the lines of the Civil Rights Protection Act, 1981 of British Columbia should be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography.

We are not going to offer here an elaborate draft statute, because we are aware that there may be many ways of effecting this basic purpose. One simple way would be to add "sex" or "gender" to the definition of "prohibited act" in subsection 1(1) of the *Act*. Another proposal that has been made is to add to the *Act*, a definition of pornography which is very close to that found in the Indianapolis by-law,¹⁷ but it may be that others favour a less particular statute.

However the drafting may be done, we are convinced that to enact this sort of legislation would confer a cause of action which has many of the attractive features of the human rights approach. It is an action which does not need the approval of the Crown or Attorney General, and will be controlled by the party suing rather than a human rights commission. It will be conducted in a public forum. It will probably take no longer to prosecute than a human rights complaint, and could take less time. The cause of action reaches the nub of what is offensive about pornography, and the remedies seem flexible. This type of action does not foreclose the prospect of bringing an action for intentional harm or, negligence against the purveyor of pornography when a link between pornography and actual harm can be established.

It seems that the most unattractive feature of the *Civil Rights Protection Act* approach is that the costs of the action must be borne by the party and not by the state, as would be the case with a criminal prosecution or a human rights complaint. Individuals confronting a pornography distributor with substantial resources might well be deterred by such a prospect, particularly when it is remembered that a successful defendant might recover a large part of its legal costs from an unsuccessful plaintiff.

In our view, however, this cost consideration should not overbear the recommendation to institute this type of action. The "class action" feature gives some useful possibility of spreading the costs among numbers of persons with similar interests. The availability of injunctive relief means that the object of the lawsuit — restriction of the circulation of a particular periodical, for example — may be achieved without protracted proceedings. Alternatively, the prospect of such relief being obtained might encourage settlements. Negotiations for such settlements would be under the control of the plaintiffs, rather than the human rights commission, and the results of such settlements could be made public so as to serve as a deterrent for other pornographers. Although, then, there are some cost disadvantages in the private action method, we think that on balance this is a desirable option.

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We note that the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society proposed in its 1984 report *Equality Now!* that civil actions against discriminators be permitted as an alternative to human rights proceedings.¹⁸ In our view, even if the legislatures should decide that human rights commissions should have an explicit 'pornography' jurisdiction like that in subsection 14(1) of the *Saskatchewan Human Rights Code*, the civil action described above should be available as an alternative. That will ensure that persons or groups with the resources and the inclination to pursue it will have a real choice of forum.

Recommendation 37

Even if legislatures decide to include in human rights codes a specific pornography-related provision, we recommend that the civil cause of action described in Recommendation 36 be provided as an alternative.

Footnotes

- ¹ An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, Section 1 (amending Section 139.10 of the ordinance).
- ² Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin Re Proposed Ordinance on Pornography, December 26, 1983.
- ³ City — County General Ordinance No. 24, 1984, Section 1, which amends section 16 of the Code of Indianapolis and Marion County. See, in particular, the new s. 16-1(8). (Hereinafter referred to as Indianapolis By-law.)
- ⁴ Indianapolis By-Law, section 1; see the new s. 16(4)(C).
- ⁵ Indianapolis By-Law, section 1; see the new s. 16(4)(B).
- ⁶ Indianapolis By-Law, section 1; see the new s. 16(5).
- ⁷ Indianapolis By-Law, section 1; see the new s. 16(6).
- ⁸ Indianapolis By-Law, section 1; see the new s. 16(7).
- ⁹ Indianapolis By-Law, section 1; see the new s. 16(5)(A).
- ¹⁰ *Jordan House v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105 (S.C.C.).
- ¹¹ Several actions have been brought in the United States by persons seeking to hold a broadcaster responsible in damages for harmful results of actions allegedly inspired by the broadcast. In *Weirum v. RKO General, Inc.* 15 Cal.3d 40 (1975), the California Supreme Court upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. In *Olivia N. v. National Broadcasting Co.*, 126 Cal.App.3d 488 (1981) the California Court of Appeals upheld dismissal of a suit on behalf of a young girl who had been raped with a plunger by a group of youngsters emulating a scene shown in a television program. The parents of a 13 year old who accidentally hanged himself while trying a stunt he had seen on the Johnny Carson show failed to recover damages in *DeFilippo et al v. National Broadcasting Co., Inc. et al.*, 446 A.2d 1036 (1982, Supreme Court of Rhode Island). In all of these cases, the powerful First Amendment protection of freedom of expression caused the court to apply the standard of whether the material had "incited" the conduct, rather than whether the broadcaster had been reckless or negligent.
- ¹² *Gouriet v. A.-G.*, [1978] A.C. 435 (H. L.).
- ¹³ *Saskatchewan Human Rights Commission v. The Engineering Student's Society, University of Saskatchewan et al.* 7 Mar. 1984 unreported (*Red Eye Decision*) at 42.
- ¹⁴ *R. v. Keegstra* 5 Nov. 1984 (Red Deer) unreported (pretrial hearing) at 20-23.
- ¹⁵ *American Booksellers Association Inc., et al. v. Hudnut et al.*, No. IP 84-791C (Dist. Indiana Nov. 19, 1984). Judgment of Judge Sarah Evans Barker.
- ¹⁶ S.B.C. 1981, c.12.
- ¹⁷ Proposed by the Women's Committee of the Faculty of Law, University of British Columbia.
- ¹⁸ Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 77.

Chapter 25

Hate Literature

We have discussed in the previous chapter the proposals we received that a remedy against pornography be provided by way of human rights legislation, as is now the case in the province of Saskatchewan. The basis of this thinking is the belief that pornography inhibits the equality of women, and their access to opportunities in economic and political spheres, by inculcating in society the idea of women's subordination. Inherent in the idea of pornography as a human rights issue is the idea that pornography causes, or at least reflects, a societal tendency to hate women. The belief that pornography and the misogyny of society are closely inter-related has given rise to the argument that pornography is hate literature against women. Some are sure that this form of hate literature can best be dealt with by means of human rights commissions. Others advocate stronger measures, namely the amendment of the hate message provisions of the *Criminal Code* so as to include protection for groups characterized by sex or gender.

The provision at the focus of these submissions is section 281.2 of the *Criminal Code*:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

Subsection (2) of this provision has been most particularly considered applicable to pornography. In section 281.2, and the related section 281.1 dealing with the advocacy or promotion of genocide, "identifiable group" is defined as "any section of the public distinguished by colour, race, religion or ethnic origin".¹ Those who say that this section should be amended to deal with pornography propose that "sex" be added to this list.

Section 281.2 was the subject of comment by the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society in its 1984 report, *Equality Now!*. The Committee recommended that subsection 281.2(2) be amended so that it is no longer necessary to show that an accused specifically intended to promote hatred.² This recommendation was accepted by then Justice Minister MacGuigan in June, 1984. He announced that the word 'wilfully' would be removed from subsection 281.2(2).³ Most of the groups who addressed this issue in our hearings also favoured the removal of this requirement for specific intent.

Another recommendation of the Special Parliamentary Committee dealt with the defences available to a charge under subsection 281.2(2). At present, section 281.2(3) of the *Code* provides:

- (3) No person shall be convicted of an offence under subsection (2)
 - (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

The Special Parliamentary Committee pointed out that it is now not clear whether the burden of raising these defences is on the accused at all times, or whether the Crown must discharge the burden of disproving a defence. Accordingly, it recommended that the *Code* be amended to make it clear that the burden of raising special defences is on the accused. The Committee rejected proposals that the defences set out in paragraphs (b), (c) and (d) of subsection 281.2(3) be removed.⁴ Justice Minister MacGuigan also agreed with the Parliamentary Committee's recommendations on the burden of proving a defence. In June of 1984, he announced that it would be made clear that this burden is on the accused.⁵

The Special Parliamentary Committee also recommended the deletion of the requirement that the Attorney General consent to a prosecution under subsection 281.2(2).⁶ The rationale for doing so was a desire to permit private prosecutions of hate literature. The Committee perceived that the section had not given rise to the volume of complaints that had promoted the requirement for the Attorney General's consent.⁷ Justice Minister MacGuigan announced in June, 1984 his intention to also accept this recommendation.⁸

We did not receive much comment on the issue of defences to this charge. However, the suggestions for removing the requirement of consent is consistent with recommendations made to this Committee.

We have given serious consideration to the proposals for using subsection 281.2(2) where pornography is concerned. There are, in our view, a number of arguments in favour of taking this course.

If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it. Indeed, precisely this point was made by the Board of Inquiry considering the application of the Saskatchewan *Human Rights Code* to the Engineering Students' Society publication *Red Eye*. The Board observed that in the existing criminal law, it seems to be circuitous that women have to use the provisions about obscenity to enforce protection from some of the widespread manifestations of hatred focused upon them.⁹ The Board considered that the evil of pornography was very similar to the evil aimed at by section 281.2 as it now stands.

We have, of course, recommended an overhaul of the sections which now appear in the *Code* under the heading "Offences Tending to Corrupt Morals", including the replacement of obscenity prohibitions by a comprehensive set of prohibitions. If our recommendations are implemented, then the contrast between the intent of pornography and the terminology and philosophy of the criminal law will not be as great as it is now.

However, the contrast between the hate implicit in pornography and the sexual morality overtones of "obscenity" is not the only reason for proposing to broaden subsection 281.2(2).

Section 281.2 was enacted following the report of the Minister of Justice's Special Committee on Hate Propaganda, 1965-1966. The Chairman of that Committee, Professor Maxwell Cohen, has identified the following passage from the Report's Preface as expressive of the Committee's rationale for proposing the hate propaganda amendments to the *Criminal Code*:

This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.¹⁰

The nub of the test, then, is whether the message that is sought to be made criminal does "injury to the community itself and to individual members or identifiable groups".

The argument that pornography does indeed do such injury has a number of features. We described in this Report the present state of experimental literature exploring the relationship between pornography and acts or states of mind on the part of its consumers that could be regarded as harmful to women. We have concluded that the research has not proceeded past the inconclusive stage. However, there is another sort of harm altogether which we think should be taken into account when considering the impact of some types of pornography for purposes of the hate literature provision. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under the law and the equal protection and benefit of the law, without discrimination on the basis of sex. This guarantee is reinforced by the provision in section 28 that the rights referred to in the *Charter* are guaranteed equally to males and females. It is argued that one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that women are inferior and subordinate.

This argument received support in the decision of Mr. Justice Quigley of the Alberta Court of Queen's Bench, in *R. v. Keegstra*.¹¹ It had been argued that section 281.2(2) of the *Code*, under which James Keegstra had been charged, was contrary to the *Charter's* guarantee in paragraph 2(b) of freedom of expression, and could not be characterized as a reasonable limit demonstrably justifiable in a free and democratic society, so as to prove constitutionally permissible. Mr. Justice Quigley took the position that it was appropriate to consider all of the *Charter's* guarantees when determining whether an alleged curb on one of them was justifiable. Against the freedom of expression guarantee he balanced the equality rights conferred by section 15 of the *Charter*, and the proviso in section 27 that in interpreting the *Charter*, Canada's multicultural heritage must be borne in mind. The need to protect these interests would justify the incursion by section 281.2 into freedom of expression.¹²

It seems to us that this balancing of interests is a desirable one. The guarantee of freedom of expression must, in our view, be tempered by the sometimes countervailing demands of the equality guarantee.

This position seems to us to be reinforced by a further consideration emanating from section 15 of the *Charter*. Subsection 15(1) guarantees the equal benefit of the law without discrimination on the basis of sex and a number of other grounds. Section 281.1(4) of the *Code* provides that "identifiable group" for purposes of the provision means a group distinguished by "colour, race, religion or ethnic origin." It is apparent that the "benefit" of section 281.2 is not available to members of groups identified by some other of the enumerated categories in subsection 15(1) of the *Charter*, like sex, age, and disability. It could be maintained, on that basis, that section 281.2 does not go far enough in the protection it provides and, for that reason, is vulnerable to

constitutional challenge. Perhaps a simple failure to include a particular group mentioned in subsection 15(1) might not, in and of itself, render section 281.2 unconstitutional. However, it would be more likely to be found unconstitutional where the excluded group is also the target of the kinds of messages forbidden by the section. The arguments and evidence before this Committee give, in our view, ample evidence that women are the targets of messages promoting hatred against an identifiable group.

It seems to us, then, that if provisions like section 281.2 are to be included in the *Criminal Code*, there are strong arguments on equality principles, stemming from the nature of pornography, in favour of extending the protection of the law to women as an identifiable group.

Having said that, however, we must examine still further questions relating to this equality rationale. The first is whether its logic requires a further extension of the hate provision to cover groups distinguished by all the other enumerated characteristics in subsection 15(1) of the *Charter* which do not now appear in section 281.2. If so, what are the implications of such an extension? We note that the hate message sections of the Canadian, Manitoba and Saskatchewan Human Rights Acts all extend the protection to each protected group covered by the legislation.

By the same token, we observe with interest recent amendments to the regulations under the *Broadcasting Act*. It is now forbidden for an AM or FM licensee to broadcast "any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".¹³ These grounds are the ones specifically enumerated in the equality rights section of the *Canadian Charter of Rights and Freedoms*. The new regulations for television and for pay television broadcasting are similar, extending not only to comment but also "abusive pictorial representation".¹⁴

The case of pornography involving children provides a useful point of departure to examine these questions. It is certainly the case that not all the children portrayed in the material deplored by presenters of briefs are female children. Accordingly, even a section including as an identifiable group "persons characterized by sex" would fail to protect all those who, on the basis of the argument set out above, would be in need of protection. It would seem, taking this ground alone, that some further bases would have to be added to make the benefit of the section really equal. On the other hand, however, it was not argued before us that pornography involving children was hate literature, in the same way that this point was made concerning pornography involving women. The complaints about child pornography focused largely on its exploitation and corruption of the innocent, and did not argue that this material taught us to hate the young. It might be argued on that basis that the dual rationale for extending the section, namely equality considerations and whether the evil aimed at actually can be described as material promoting hatred, is not present.

Given the nature of the material and submissions we have received in the area of child pornography, we doubt whether the dual rationale for extending the section to persons identifiable by age is present. We would make the same observations with respect to the other protected grounds listed in section 15 of the *Charter*. At this time, we simply have no evidence on which to conclude that hate propaganda with respect to these groups is being disseminated. On the other hand, however, we are aware that the imperatives of the *Charter* are strong ones. We have seen, in the case of the hate message section of the *Canadian Human Rights Act*, the *B.C. Civil Rights Protection Act, 1981*, and sections 281.1 and 281.2 themselves, how responding quite specifically to a particular emergency can result in legislation that can soon be perceived as too narrow.

We have concluded that it would be desirable to expand the definition of identifiable group in section 281.1(4) of the *Code* to include protection for an identifiable group based on sex or gender and we see little cogent reason for refraining from extending it to other groups named in the *Charter*, even if the need may not be immediately obvious. We think, however, that this change must be accompanied by implementation of the three changes recommended in *Equality Now!* and accepted by the Justice Minister of the day in responding to that report: removal of the requirement of wilfulness from the section; removal of the requirement that the Attorney General consent to a prosecution, and classification of the defences.

Recommendation 38

The definition of "identifiable group" in subsection 281.1(4) of the Criminal Code should be broadened to include sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.

Recommendation 39

The word "wilfully" should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.

Recommendation 40

The requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2) should be repealed.

We do not think that removing the requirement of specific intent which is contained in the word "wilfully" will leave section 281.2 unduly broad. Still in place is the requirement of general intent which is an ingredient of every criminal offence. Thus, a person who unwittingly or accidentally communicates a message will be spared conviction.

In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done "wilfully". The motive behind the publication may be described as sexual entertainment, or simply profit; even an unattractive motive, other than hatred, would serve to defeat a prosecution where specific intent was required. Such a result is surely not desirable, for it amounts to saying that one might create messages promoting hatred against women, or other groups, as long as that effect is only incidental to the profit motive.

We are mindful that some persons fear that removal of the requirement of the consent of the Attorney General will bring a flood of prosecutions, many of which would be ill-founded. The fear of potential harm to the innocent accused is behind these concerns. A slightly different perception of the issue is the concern that without the requirement of the Attorney General's involvement, important cases which should be won will be bungled by inexperienced complainants, with or without legal advisers. With regard to the first of these concerns, the Report *Equality Now!* notes that there have been fewer than six prosecutions under the hate provisions since their enactment.¹⁵

We expect that attempts to use the revised section by way of private prosecutions may, indeed, occur frequently during the first period of its being in force. However, once the limitations of the provision are recognized by citizens and lawyers, resort to it may decline. The section, in our view, will indeed cover a very limited range of material, for much that is repellent, or even criminal, may not be considered to be a message of "hate", even in the sense of misogyny. We hope that the other sections we propose to deal with pornography will, as well, reduce the need for persons to resort to private initiative by way of section 281.2.

We also think that extension of subsection 281.2(2) to include the hate messages of pornography may well require another change to the definitions in the section. At present, only "statements" are caught by the provision. Subsection 281.2(7) defines statements as including "words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations". Because the general term "visible representations" may be interpreted along the lines of the specific ones preceding it, namely "gestures" and "signs", we question whether the graphic images of pornography would come within this definition.

Many of the messages that convey hatred of women may be by way of visual representations, or a combination of the visual and written. At the hearing in Québec City, for example, we were shown a tabloid bearing on the front a photograph of a fully dressed woman, on her hands and knees, wearing a heavy leather dog collar and being pulled by a lead. Across the picture were words suggesting that as women are bitches, they should be chained. The combination of the colour photograph of the woman subjugated like an animal, and the words, was most compelling. In one notable instance, no words were used at all. Often drawn to our attention at the public hearings was a cover

from Hustler magazine showing a meat grinder. Protruding from the top were what remained of shapely female legs. Coming out at the other end was red minced meat.

We suggest that the term "visual representations" (or a term like it) be added to the section, to introduce some certainty as to whether a photo or other graphic way of conveying hatred would be included.

Recommendation 41

The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.

Given the hope that our other proposed sections, particularly those dealing with sexually aggressive pornography, will deal with much of the material which offends, what area then is left to the hate provision? Violent or degrading material which is not sexually explicit may well be reached by a revised section 281.2. Additionally, we note that with respect to prosecutions under section 281.2, there is no defence of artistic merit, education or scientific purpose. The section may thus be regarded as a sort of complement to the provisions we have recommended to deal with "sexually violent and degrading" material, which do provide defences of these sorts.

We think that one of the important reasons for extending the reach of section 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornography from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.

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Footnotes

- ¹ The definition is found at s.281.1(4) of the *Criminal Code*. It is incorporated into s.281.2 by s.281.2(7).
- ² Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, (1984, Supply and Services Canada, Ottawa) at 69-70.
- ³ Minister of Justice and Attorney General of Canada, News Release: "Justice Minister Proposes Measures Against Hate Propaganda", June 1, 1984, at 1-2.
- ⁴ *Equality Now!*, Recommendation 37, at 71.
- ⁵ Minister of Justice News Release at 2.
- ⁶ *Equality Now!*, Recommendation 37, at 70.
- ⁷ *Ibid.*, at 69.
- ⁸ Minister of Justice News Release at 3-4.
- ⁹ *Saskatchewan Human Rights Commission v. The Engineering Students' Society, University of Saskatchewan et al.*, 7 Mar. 1984 unreported (Red Eye Decision) at 32.
- ¹⁰ Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," (1970) 9 *Alta. L. Rev.* 103, at 113.
- ¹¹ *R. v. Keegstra*, 5 Nov. 1984 (Red Deer) unreported (pretrial hearing).
- ¹² *R. v. Keegstra* (pretrial hearing) at 20-23.
- ¹³ *Radio A.M. Broadcasting Regulations, amendment*, SOR/84-786, schedule, s.1 (amending s.5(1)(b)); *Radio (F.M.) Broadcasting Regulations, amendment*, SOR/84-787, schedule, s.1 (amending s.6(1)(b)).
- ¹⁴ *Television Broadcasting Regulations, amendment*, SOR/84-788, schedule, s.1 (amending s.6(1)(b)), *Pay Television Regulations*, SOR/84-797, s.6.
- ¹⁵ *Equality Now!*, Recommendation 35, at 69.

Chapter 26

Film Classification and Censorship

1. National Action

A number of submissions to the Committee suggested that Canada implement a film review and classification system on a national scale. There are several different ways of structuring such a system.

One would be to encourage the various provincial boards to consult with one another to develop uniform standards of acceptability. Then each board operating locally would apply the common standards, and no new body need be set up.

Alternatively, the provinces could set up a national or joint board to which each province would appoint representatives. The Manitoba legislation contemplates such a possibility by providing that Manitoba may co-operate with the governments of other provinces in appointing a joint film classification board of not more than 15 persons, nominated by the provinces. The joint board would classify films or slides to be exhibited in the member provinces.¹

A third possibility is that the national review function could be an aspect of an expanded and improved Customs service. In Australia, the authority for the federal government to have a censorship board arises from its jurisdiction over Customs, and, by agreement, the states have given to the national board the power which they have to review locally produced films.

We have considered the suggestion that we opt for a national review function, (see Section II, Chapter 14 of the Report) along with each of the ways in which it would be possible to bring it about, and we have decided not to recommend this approach.

It seems to us that review at the provincial level serves a valuable function. We have been impressed by the desire of people to feel that they have access to the review process, and that they can influence its decisions. A national board would be even more remote, in the eyes of some, than the boards now located in the provincial capitals. Over and over again, we were told that standards of acceptability do vary from place to place in Canada. The provincial board can

and should be more sensitive to local taste, albeit within the framework of the national criminal law, than a national board could be. As we discuss elsewhere, we have recommended the deletion from the *Criminal Code* of the "community standards" test which now helps determine whether material is obscene, because we do not think that this element of subjectivity has a role to play in the criminal law. The community does, however, have a useful role in determining what it wants its young people to see, as opposed to determining what is criminal, and we think that that role can be exercised to more effect on a provincial rather than a national basis.

Recommendation 42

Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.

2. Problems with Co-ordination of Provincial Regulation

Having rejected the prospect of review on a national scale, however, we must still observe that there are problems affecting a provincially-oriented system which bear looking into. We have noted that some provinces and territories have no local film review authority. In this position are Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories. Although they may consider it suitable to borrow the classifications of others, it seems that absence of legislation may be depriving them of more than a classification function.

The provincial film review legislation, for example, requires that theatre operators observe classifications, advertise them, and post them by the entrance to the theatre for the guidance of patrons. We heard complaints in Whitehorse that local theatres were inconsistent in their practices concerning notification of film classifications. Parents were sometimes unable to determine whether or not a particular movie would be suitable for their children. Some complained, in a similar vein, about non-enforcement of age restrictions on entrances to theatres.

Accordingly, we think that it would be desirable for provinces without film review legislation at present to explore whether they wish to enact it, in whole or in part. Even if they do not have the inclination or the resources to institute review of films, the aspects of the typical film review legislation which might usefully be enacted are those concerning notification of the classifications and entrance restrictions for children.

Recommendation 43

Those provinces and territories which have not implemented a film review system should consider doing so.

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Another difficulty which will persist with a provincially-based system of review and classification is the problem that clearance in the most permissive jurisdiction can be, in effect, clearance for national purposes if the films are videotaped and then made available for private as opposed to public usage. It is, in our view, inevitable that entrepreneurs will take advantage of the differences in standards between provinces by using the most permissive jurisdictions as clearing houses for films destined for national distribution as videos. Mail order houses based in these provinces will offer material to a national market.

This problem of the *de facto* national influence of the boards in some jurisdictions in this regard was addressed by many briefs at our public hearings. The boards most often noted in this connection are those of British Columbia and Québec, which take a more tolerant view of some kinds of explicit material than does, say, Ontario. This issue generates considerable frustration and concern, especially among those whose views do not accord with the views of the boards which they perceive to be having this national influence.

We can appreciate the concern that is reflected in these submissions. However, in most jurisdictions, only films or videotapes intended for commercial exhibition are required to be reviewed and these represent a small proportion of the total amount of material in circulation. Videotapes, not films, are the largest aspect of the home viewing market. At this time, videotapes for private use can be imported or produced and sold in most jurisdictions without any contact at all with provincial classification or censor boards. The circulation of the bulk of this video material cannot thus be laid at the door of any censor board, however relaxed may be its views on what is acceptable in films.

Moreover, we note with interest the introduction in some provinces of schemes to regulate sale and rental of videotapes intended for private consumption. This direct attack on the problem of unsupervised circulation of allegedly offensive material may be more effective than any attempt to enforce uniform standards on all boards, or establish a national board.

3. Relationship Between Customs and Film Classification

It seems to us that the real influence bearing on the circulation of offensive material within Canada is that of Customs. It is, after all, through Customs clearance procedures that films and videotapes are imported. One can expect provincial film review authorities to be, if you will, a second filter for videos which are imported only if someone within the province exhibits them commercially or otherwise brings them within the comparatively narrow scope of the film or video classification scheme.

Accordingly, we think that the emphasis in our inquiry about national circulation of offensive material should be at the point of entry: the Customs administration. We are, in regard to pornography as in regard to so many other things, an importing nation. The film review boards, even if co-ordinated on a national level, cannot really be expected to control the adverse effects of importation.

In one respect, however, the link between Customs and film review authorities bears closer examination. As we have said, films or videos intended for commercial showing must be reviewed by provincial authorities. Before they can be reviewed, they must be in the country. To effect their entry, their importers would ordinarily be required to satisfy Customs officials that the films are not "immoral or indecent", under the wording of the present *Customs Tariff*.

There has grown up a practice in some jurisdictions of rolling into one, the Customs determination of acceptability for entry and the provincial film review board's determination of acceptability for showing. There are many reasons for doing this. On a practical level, importers will not want to go to the trouble of bringing a film into the country only to be told some time later that it cannot be shown in the province. In addition, the volume of material passing through Customs is so large that the relief of sharing the review work with another authority may be welcome. On a more fundamental level, many believe that it is not the role of Customs officials to act as the arbiters of public taste. Although to some observers, this view extends to claiming that neither Customs nor the film classification boards should play this role, in others, it merely results in a preference for the provincial authority over the Customs branch.

Whatever its rationale, it is clear that this practice involves deference by the Customs officials to the view of the film review board. Such deference can manifest itself in a number of ways. In Ontario and British Columbia, films being imported go in Customs bond directly to the office of the censor. In Québec, a practice has developed of allowing the importer to take the films from Customs and deliver them to the Bureau de Surveillance. There is no control over what happens to the film on its way from Customs to the office of the Bureau. A period of 60 days is given by Customs to the importer in which to seek clearance of the film from the Bureau. In all these cases, once the film is approved by the provincial censor, it is granted entry to Canada, effective not from the date of the censor's clearance but rather from the date of its initial entry at the Customs port. Customs officials do not consider that they have totally delegated their own powers to the various censor boards, because they still retain, in theory, the power to refuse entry even to a film which has been accepted for exhibition in a province.

We heard numerous complaints about this sort of relationship between Customs and provincial film reviewers. Singled out for special complaint was the 60-day grace period allowed to films entering by way of ports in Québec. It was felt that the unscrupulous could use this period to make videos of the film

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which had been put in their custody. Then, even if it did not receive clearance for showing in the province as a film, the videos would nonetheless be circulating. Some witnesses have attributed to this scheme a high proportion of the offensive videotapes which they say are now circulating in Canada. It should be noted, however, that although such procedures may contribute to the circulation of pornographic tapes, a much more likely factor is that Customs only inspects a very small proportion of what actually comes into the country. Nevertheless, we have reservations about the apparent delegation by Customs authorities of their power to assess material entering the country. We are not comforted by their retention of a notional power to refuse or permit admission of a work contrary to the view of the local review board. In practice, we think such an overruling is unlikely to happen.

Our problem with this delegation is that it cuts into the attempt, and the opportunity, to forge national standards in the administration of the *Customs Act* and *Customs Tariff*. However much we may want to recognize the role of local taste in determining who sees what in provincial theatres, we think that there should be common national standards about what comes into the country.

We do not think that Customs officials should defer to the opinion of local boards. While to do so may have been helpful and convenient when the standards used by Customs to determine obscenity, and the level of officers' understanding, were relatively unsophisticated, we prefer that Customs concentrate in developing its own talents in this area. Although to resort to provincial assistance might be tempting given the scant resources available to Customs for the "pornography detail", we think that the focus should move to securing more resources. In our view, only the development of an active and sophisticated Customs will really address the problems of entry into Canada of pornographic material.

We have attempted to discover the details of the 60-day grace period in Québec which so angered some of the witnesses at our public hearings. They are discussed in detail in Section II, Chapter 14. Here, let us observe that, in our view, the more serious problem is the general influx through Customs of material which, because it will not be shown publicly, may never even be legally required to go to a film censor, rather than the possible abuse of the Customs/censorship interface in respect of a small amount of material. Over and above that, however, we have been advised that Customs officials are interested in ending this arrangement. We urge them to do so.

Recommendation 44

Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.

4. Problems of Substance

We do not intend to comment here in depth on the details of running a provincial film review system. However, a few aspects of provincial regulation do have a bearing on our recommendations.

In devising our approach to pornography, we have proposed a three-tier classification of material. The most offensive material, that involving children or in which harm is suffered by the participants in its production, we would subject to harsh penalties, with no defences based on intent or value being available. The second tier of material is that which is sexually violent and degrading. Here we have recommended a new prohibition with respect to which the accused could defend the material (here a film or video) on the basis that it has artistic merit, or educational or scientific purpose. Material in this category is also subject to restrictions on its public display and on access to it by young people.

The third tier of material is that in respect of which we think there should also be controls on availability and display, but no absolute criminalization. We have restricted the use of the *Criminal Code* in this tier to prohibiting availability of this material to children, and to reducing its visibility and thus its capacity to shock or offend the unwilling consumer or passerby.

Because Customs is unlikely to be able to control the importation of all films and videos, we realize that some films which people would argue are unacceptable, will come into the country. In addition, of course, films that are produced within the country go to the provincial boards without any intermediary review.

Provincial film review boards will, therefore, be required to deal with all films that are presented to them with the purpose of being shown publicly. How they choose to respond to the material may vary, as it presently does among the boards. One approach is simply to classify the films according to the provincial scheme. A second approach involves the banning or cutting of films prior to a classification being designated.

One of the important roles of the state with respect to pornographic material is the protection from offence. We do not think, however, that as a rule, banning is necessary in order to protect people from being offended. We think that the classification systems now in place in the provinces have a major role to play in preventing offence, as do the controls on access to theatres by young people. The requirement of posting and advertising the classifications and the further requirement, in some jurisdictions, of warnings about certain kinds of content, are also in our view effective and desirable ways of helping people avoid the material which they do not want to see.

While we endorse measures like these in general, we do note that there are some difficulties with the working out in practice of these systems. Particularly with respect to classification, we are concerned that the standards upon which

classification is being done do not always appear in the legislation, or even the regulations. We regret this for two reasons.

Firstly, the legislative delineation of standards is a valuable way to protect against improper use of discretion in the administration of a scheme; the rights of exhibitors will be safeguarded when the legislature enunciates standards which must be observed by those administering the law. Secondly, articulation in legislation ensures a certain publicity for the standards, and allows citizens to know what is being done on their behalf. No matter how many pamphlets a board may distribute discussing its classification scheme, the legislative articulation still is the most enduring. A government may wish to include its standards in regulation rather than legislation, because regulations can be more responsive to changing community values. However, in our view, positive results will flow from greater elaboration of the classification standards in law, be it statute or regulation.

We have also observed that the legislation often does not contain any articulation of the standards upon which a board will be prohibiting or cutting films. What we have said above about the advantages of enunciation of standards in law, we reiterate even more forcefully in this connection. The power to prohibit exhibition of films or to cut them is an intrusion on the right of freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. It must be a reasonable limit, *prescribed by law* and demonstrably justifiable in a free and democratic society, in order to survive constitutional challenge. The case challenging the Ontario *Theatres Act* shows, in our view, that these provisions for prohibiting and cutting films are on an infirm constitutional footing. We think that the provinces will be interested in reviewing them to ensure compliance with the *Charter of Rights*.

Of course, one way of ensuring compliance with the *Charter* is to remove from the provincial boards the power to cut or to ban films. We prefer this approach. If the provincial board is of the view that the film is caught by the prohibitions against first or second tier material, then presumably the board does not need any additional power to prohibit or to cut it. For greater certainty, the statute may provide that the board may decline to classify a film which, in its view, contravenes the *Criminal Code*, but there would be no power to cut, and no power to prohibit the showing of anything not prohibited by the *Criminal Code*. If material is not prohibited by the *Code*, then we believe that it should be shown, at least to those who wish to view it.

Recommendation 45

Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.

If the provinces decide to maintain the power to prohibit or cut films, then we strongly recommend that the standards upon which these decisions will be made should be embodied in legislation, or at least in regulations.

Recommendation 46

Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.

5. Advertising Restraints

There exist in provincial legislation, broad powers to control advertising of films. In addition to specific provisions requiring that the classification of a film be shown in advertising material for it, the legislation usually confers a power of prior restraint of advertising on the authority. Advertisements must be submitted to the board, which may approve or disapprove them.

We think that the rationale for this system of prior restraint has a lot to do with the exercise of the prior restraint powers of the boards with regard to film censorship. It would be regarded as inconsistent to go to the trouble of removing a particular scene from the film only to have it appear on the billboards outside the theatre. Interestingly enough, however, Manitoba, a province which does not censor films by way of prior restraint, has not only a power to impose prior restraint on advertising² but also a very intrusive power to remove offensive advertising from public places.

Any peace officer or inspector in Manitoba may be authorized by the board to order the removal from all public places of any advertisement relating to any film or slide if the advertisement is of an immoral, obscene or indecent nature or depicts any murder, robbery, criminal assault or the killing of any person. If the licensee of a theatre does not remove the material within 24 hours, then the licence will be cancelled by the Minister. There does not appear to be any right of appeal from an inspector's order.³

We are concerned with both the prior restraint of advertising and with broad power like that in the Manitoba statute just described. On the other hand, we think that it is quite reasonable, and entirely consistent with a scheme of classification, to require the theatre owners to include the classification of the film in advertising for it.

It seems to us that prior restraint on advertising is difficult to justify in light of the provision we have made to control display of visual pornographic material, discussed above. This provision would make it an offence punishable on summary conviction to display visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation. In our view, this offence would include display of such material in a theatre or outside it. The defence to the charge would be to demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advertising of the display within.

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This sort of control upon the location of the third tier material is, to us, a far less intrusive way of protecting public sensibilities than the imposition of prior restraint.

Recommendation 47

The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.

6. Relationship Between Provincial Film Review Boards and the Criminal Law

The Supreme Court of Canada has stated that there is no constitutional reason why a prosecution cannot be brought under the obscenity provisions of the *Criminal Code* against a film which has been approved by a provincial review board.⁴ Under the *Code* as it now stands, the issue is whether approval of a provincial censor board would amount to a defence against a charge under section 159 or section 163 of the *Code*. Section 159(2) prohibits the doing of a number of acts "without lawful justification or excuse", and it is argued that the approval of a censor board should, in law, amount to such a lawful justification. The Canadian Motion Picture Distributors Association made representations to this effect to our Committee.

As we have noted earlier in this Report, Bill C-19, the omnibus Criminal Law Amendment Bill introduced in early 1984, would have recognized the operation of provincial law respecting film classification. With respect to offences under sections 159 and 163 of the *Code* the bill proposed a new section 163.1, which would have required the personal consent of the Attorney General to a prosecution of a film or videotape presented, published or shown in accordance with a rating or classification established pursuant to the law of the province where the film was shown. This provision would not have helped in those provinces without a local film classification system, of course, but the Motion Picture Distributors' Association nonetheless regarded it as an improvement over the previous laws.

We do not include in our proposed amendments any provision of this nature. We recognize that whether they have explicit power to ban films or not, an authority will inevitably make a preliminary determination of whether, in its view, a film offends the *Criminal Code*. Yet, even though this determination about criminality is going to be made, we do not think that it is desirable to elevate the board's judgment to the status of a defence or a discretionary bar to prosecution. If the board's decision were to constitute a full defence, then we would have, in effect, a delegation to provincial authorities of administration of the criminal law sanction. Where the decision of the board is a discretionary bar to prosecution, as in Bill C-19, the delegation is not complete, but the concern remains the same.

True, local prosecutors make decisions about what charges to bring under the *Criminal Code* and that is a form of decentralization, but it is not decentralization that is really the concern here. In our view, the objectives and the outlook of the classification or censor boards, while somewhat congruent to those of the law enforcement authorities, are nonetheless different from them. They are concerned primarily with community tastes, with the making of those kinds of subjective evaluations about what offends which we have sought to remove from the criminal law. We do not think that it would be useful to reintroduce that element into the law, indirectly, by means of reliance on the judgment of classification or censor boards about what breaches the criminal law.

It will be said, of course, that one is relying on the board's assessment of what does not breach the law, rather than on their assessment of what does. Surely, it will be argued, we can be certain that something does not offend the law if it is approved by a board as strict as the Ontario one, for example, and we need not hesitate about conferring immunity from prosecution. Here we meet again the concern about the variation from jurisdiction to jurisdiction in local censor board standards. Some boards may well take a different, and more permissive view, of the criminal threshold than would the local Crown attorney or the court. If a film were passed by such a board, then one might still not wish to insulate it from scrutiny by a court. In such a case, a provision like that in the proposed section 163.1 would produce the unhappy spectacle of the Attorney General and classification or the censor board at loggerheads.

The standards used by Crown attorneys and judges to determine criminality may well, of course, vary from place to place. But the fact of regional variation in the criminal justice system does not mean that we should add yet another system (itself affected by regional variation) to the decision-making process, possibly to conflict with the criminal justice system.

We are prepared to make one exception to this general position, an exception which is made necessary in our view by our recommendation on access of children to visual pornographic material. We have recommended that the *Criminal Code* make it an offence punishable on summary conviction for everyone who is the lessee, manager, agent, or person in charge of a theatre, to present therein to anyone under 18 years of age, any visual pornographic material. This provision could well include the acts of a theatre owner in showing a movie classified in the adult or similar category, for viewing by persons over 14. The film, while not restricted, might nonetheless contain some scenes which would attract the operation of the proposed section.

We have provided a defence to this offence for anyone who can demonstrate that the film or tape has been classified under the rating system for film and video in the province, as acceptable for viewing by those under 18. Thus, the certification of the board would insulate the theatre operator from prosecution.

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Here, we are not deferring to the decision of a provincial authority about whether to prohibit a film or not; we are dealing with classification only. Moreover, the material being classified is, we assume, legal according to the *Criminal Code* provisions we have devised. Otherwise, presumably the board would not have classified it at all. So, we are really deferring here to the board's judgment about who should see legal material. We are content to defer in these circumstances.

Recommendation 48

Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the *Criminal Code*, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.

7. Regulation of Video Recordings

There was strong support at the public hearings for review and classification schemes applicable to video recordings sold or rented for private use. The major concern of advocates of this proposal was for young people. Worried about the kinds of violence, degradation and explicit sex which children might be seeing on videotapes, parents and others were concerned that they now have almost no effective way of monitoring children's viewing.

We were told that the covers and advertising of videotapes often do not give accurate clues about the nature of the film. The merchants who rent tapes may not be as vigilant as many would hope in ensuring that young people avoid the worst material. Even where the retailer is watchful, young people may be getting videotapes in the same way that they traditionally got liquor or cigarettes: having an older youth obtain supplies for younger peers.

The ease with which videotapes can be duplicated means that they will be widely and readily accessible. Outlets have proliferated, with videotapes being available anywhere from the large department store to the corner gas station to the specialized video outlet, be it an "adult" video club or neighbourhood family store. Video recorders are now reasonably widely available in private homes across Canada, and home viewing means that consumption of the materials can take place in private. For many young people, this means away from supervision.

At present, only Ontario and Nova Scotia have included distribution of videotapes for private viewing within the provincial classification schemes.⁵ Apart from these initiatives, which happened so recently that information about how effective they are was not available to us, there are almost no controls on videotapes intended for private use. Conceivably, of course, importation of videotapes would be subject to Customs regulation, but there was a widespread feeling that this is presently most ineffective. There simply

are not the resources to enforce the *Customs Tariff* thoroughly. The distribution by mail of obscene videotapes would be within the *Criminal Code* and *Canada Post Corporation Act* provisions respecting use of the mails for distribution of pornographic materials, but here again, enforcement is perceived as ineffectual.

We can see some real merit in having a regulatory scheme designed for video recordings that are not shown publicly. We believe that the scheme should include only classification, but not prohibition or cuts. The power to prohibit, in our view, should be no more than a power to prohibit circulation of material offending the *Criminal Code* law, as we have recommended in the case of film classification.

Recommendation 49

Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the *Criminal Code* but not be empowered to prohibit or cut video recordings which are not contrary to the *Criminal Code*.

Both Nova Scotia and Ontario have used the device of the film exchange licence to bring video retailers within the ambit of provincial legislation. Clearly, in our opinion, regulation of videotapes belongs at the provincial level, if done at all, and we see merit in the Ontario and Nova Scotia approach.

There are a number of problems which confront any authority seeking to regulate videotapes. One of the threshold issues is whether and to what extent videotapes should be submitted to a board and classified. At the point of starting up a system, the classification task (of all existing tapes available in retail outlets) would be huge. Even once that bulk had been digested, however, the large number of videotapes in circulation would still make the classification task formidable.

Even though regulation of videotapes is a recent innovation, there are already two different approaches to this problem. The *Video Recordings Act, 1984* of the United Kingdom requires that all videotapes, except for those in certain exempted categories, be presented to the authority in order to be classified. Nova Scotia, on the other hand, recognizes that tapes in an "unclassified" class will be distributed. In many instances, the videotape will be a reproduction of a film which itself has already been classified, and the classification of the original film will apply to the tape. However, not all tapes will be reproductions of classified works. It is clear that the thorough solution, to classify everything, is also the most demanding of resources.

The issue of advertising the classification may well present some technical difficulties. Affixing labels to the cartons and the tapes is possible, but boards may wish to consider whether it is possible or desirable to put some mark on

the actual film of a cleared tape. In the course of our consultations, we learned of the importation into Canada of a large number of empty boxes for a particular videotape. No tapes of that title were cleared through Customs. The cartons seem to have been destined for underground copies. Unless some symbol of board approval, which is difficult to counterfeit, could be put on the tape itself, it would be difficult to control this type of circumvention of a local system.

The Nova Scotia plan has a feature which we find quite attractive in the context of this problem of advertising. The regulation requires the retailer to put the classifications on each list of tapes distributed to customers. Such a requirement will aid in achieving what must be one of the most important objectives of this type of scheme: putting into the hands of parents and other adults the means of monitoring and guiding the viewing activities of their youngsters.

Another issue to be faced by those contemplating establishment of a video classification scheme is that of penalties for breach. Presumably, a key element in the scheme would be a requirement that persons not distribute tapes to those for whom the classifications indicate they are not intended. Our survey of the provincial censorship legislation shows, however, that any penalties provided for breach of the *Acts* or regulations are quite small. As systems founded on prior restraint, and aimed at preventing showings rather than penalizing them after the fact, these censorship regimes have not depended for their efficacy on prosecutions.

Yet proliferation of videotapes and the tremendous variety of outlets where they may be available, coupled with an absence of prior restraint, leads us to suggest that the issue of penalties should be a serious one to framers of any video regulation scheme. The *Video Recordings Act, 1984* of the U.K. provides quite substantial penalties. Supplying a video work in respect of which no certificate has been issued will, for example, attract a fine not exceeding £20,000.⁶ Forfeiture of the videotape involved in the offence is also called for.⁷ We think that using stiff penalties for violations of the scheme is preferable to using prior restraint.

A further element of a video retailer licensing scheme might usefully be considered. If retailers were required to keep a log showing the source, to them, of the various tapes which were sent to their stores, then bootleg tapes might be more readily detected. A tape which appeared in stock but in respect of which there was no *bona fide* supplier listed in the log, could well prompt the sorts of inquiries which might disclose not only breaches of the classification system but also of Customs legislation.⁸

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**DRAFT SUBMISSION OF BOOK AND PERIODICAL DEVELOPMENT COUNCIL TO
PARLIAMENTARY COMMITTEE CONCERNING BILL C-54**

I. A Word about Us

The Book and Periodical Development Council (BPDC) is the umbrella organization for associations involved in the writing and editing, publishing and manufacturing, distribution, and selling and lending of books and periodicals in Canada. Our twelve full-time members represent approximately 6,000 individuals and 5,500 firms and institutions in the field; our six associate members represent an additional several thousand individuals, firms and institutions. Our membership list is appended to this submission.

A major part of the BPDC mandate is to encourage the dissemination of information and ideas via the printed word.

II. Why we are Concerned about Bill C-54

We are, to use the language of the bill, "dealers" in books and periodicals. We believe that bill C-54, if passed in its present form, will unjustifiably limit the range of materials we

will be able to make available to the public. We further believe that it will be impossible for us to tell when we are in contravention of the criminal law, a contravention which may result in imprisonment for up to ten years. We believe that even in the event of acquittal, the economic costs of criminal proceedings are such as might well bankrupt many of us.

III. Freedom of Expression

Sexual issues are social issues. As such, they are appropriate topics of discourse in a democratic society, and appropriate subject material for the artistic imagination. The effect of Bill C-54 would be to limit unjustifiably the scope of this discourse. The visual portrayal of virtually all sexual activity, including legal sexual activity between consenting adults, is defined as pornographic by the legislation: s. 138. Printed matter which is found to promote, encourage, or advocate much of this activity is similarly pornographic. "Dealers" in such matter are criminals, unless they can demonstrate a defense.

The Criminal Code provisions now in effect are based on community standards of tolerance. Illegal material must involve the "undue exploitation" of sex. It has generally been held that the explicitness of the portrayal is a factor. These tests have their difficulties. They do not involve the blanket prohibition

on discourse which would result from the enactment of C-54, however. Under the proposed legislation, the existence of a sexual image, whether or not it is "undue" and whatever its explicitness, would be pornographic. We share society's general abhorance of sexual violence and degradation, but the extreme measures proposed in this bill will have the effect of restricting legitimate expression of sexuality, in a most harmful fashion.

These issues are particularly important for material dealing with violence and sexuality, and for material depicting or directed at children, as artistic merit and educational purpose are not defenses for this material: s. 159.1(1). Materials concerning or directed to young people which affirm the healthy aspects of sexual activity will be illegal. Material which explains to young people what restrictions on sexual activity are necessary to avoid sexually transmitted diseases including A.I.D.S. might well be illegal. Information concerning birth control faces the same restrictions. While the issue of sexual education of adolescents may be controversial, criminalization is not an appropriate response.

Fiction and poetry directed to young people will be barred from portraying teenagers as sexual beings, thus depriving adolescents of healthy expression for that aspect of their lives. We repeat, we are not advocates of child pornography, and we find

violence against children, sexual or otherwise, to be abhorrent. The solution to those social ills, however, cannot rest on denying society and its children information and artistic expression relevant to the lives of our adolescents.

Child sexuality and violent sexuality are themes relevant in our society, and thus of interest to artists. They are legitimate themes of artistic expression today, as they have been for hundreds of years. In Shakespeare's Romeo and Juliet, for example, a scene portrays the awakening of the two lovers in their nuptial bed. Juliet is aged fourteen; Romeo is presumably not much older. This is clearly child sexuality, and would be pornographic under the proposed law. Similarly, in Shakespeare's Titus Andronicus, an adolescent girl is raped and severely mutilated by soldiers. That scene's power is in the grotesque and arbitrary violence against an innocent, and the reader or audience is left shocked and disgusted. It is counterproductive to the aims of the proposed bill that such a message be illegal.

Freedom of expression is one of society's most cherished and important values. Freedom of expression about sexual matters is of great general importance to our society, touching as it does so many fundamental issues and so much day-to-day activity. The proposed bill is a misconceived attack.

IV. How Do We Know What Pornography Is?

The proposed act contains penalties of up to ten years in prison for persons dealing in pornography: s. 159. To justify such a penalty, it is appropriate that we, the potential "dealers", be able to recognize what is pornographic and what is not. The bill as drafted contains enough ambiguous terms that this will not be possible. A few examples illustrate the problem.

Consider the definition of 'erotica': s. 138. This involves the depiction of certain bodily parts "in a sexual context or for the purpose of sexual stimulation". How do we recognize a sexual context? Are suggestive advertisements for skin cream erotica? Does one suggestive advertisement mean that the entire magazine must be displayed only in an opaque wrapper? There is no explicit requirement that the bodily part be unclothed to constitute erotica. What images are we to understand as offending the legislation? One of the prohibited bodily parts is described only as "the human anal region". What are the parameters of that region? Is any visual representation of a buttock, for example, deemed by the section to be erotic?

Criminal law has in the past relied on the explicitness of a depiction for a finding of obscenity. That criterion is not adopted explicitly in the bill. Are we to understand that any depiction of the bodily parts listed deems the depiction to be

erotica? Or that all depictions of intercourse are prima facie pornographic: see section 138(a)(vi).

How do we recognize matter which "incites, promotes, encourages, or advocates" sexual practices: s. 138 (b)? Can we, in works of fiction, portray paedophiles, for example, as three-dimensional characters, or does this promote paedophilia?

Are articles in newspapers proposing reform of laws describing minority sexual practices or proposing reform of laws relating to sexual practices to be criminal, and are we to become criminals by distributing or selling such newspapers? Does the inclusion of one offensive personal advertisement render an entire newspaper pornographic? Does everyone involved with that newspaper therefore become a "dealer" in pornography?

At what point does energetic or passionate sexuality become "violent": s. 138 (a)(iii)? Can sexuality be portrayed in the context of oppressive relationships, or do such portrayals by their nature involve the degradation of the subject?

Section 138 (a)(i) concerns depiction of sexual activity involving "a person who is, or is depicted as being or appears to be," under the age of eighteen years. Whether a person is depicted as being or appears to be under the age of eighteen years is presumably a matter of fact, to be decided by the trial

judge or jury. It is not reasonable to expect a news vendor to be able to accurately predict whether a jury will find that a person appears to be under the age of eighteen years.

As important, the defenses are flawed and vague. What is an "educational purpose": s. 159.1, 159.6? Does an article contained in a feminist or political magazine which circulates to the population as a whole have an educational purpose? Is it sufficient that an article make the reader think, or is it necessary that the purpose of the article be to impart new information to the reader, or teach the reader how to do something? Can an article be educational if it is directed to the public as a whole, or is the exception a limited one, to be granted for educational institutions only? Are Bible stories 'educational', or are representations of the story of Lot and his daughters to be outlawed?

Our lawyers advise us that implicit in each and every example of this inept legislative language is a constitutional argument about "freedom of expression". Since the entire Bill represents a restriction of freedom of expression, we will face a decade or more of constitutional battles as we fight line by line whether each of these open-ended phrases are a "reasonable limit" of free expression, within the meaning of section 1 of the Canadian Charter of Rights and Freedoms.

The whole act is flawed by this bad wording. The legal cost of determining meaning--a legal cost imposed on us--is an outrageous burden.

V. Defenses: A Mystery Parcel which We have to Unpack

The bill puts the onus on the accused to demonstrate artistic merit, scientific, medical or educational purpose, or reasonable efforts to ensure that persons under the age of eighteen years were not involved in the pornography: s. 159.1, 159.3, 159.6. We are offended that the burden is to be on the accused. The state should not be criminalizing artistic, scientific, medical, or educational material, and the proof that material forming the basis of a prosecution is not in these classes ought to be part of the prosecution's case. Similarly, the state ought not to be prosecuting persons who have a reasonable reason to believe they are operating within the law, and proof contrary should be required of the crown. If the presumption of innocence in our society is to have meaning, it must mean that the crown must establish its case. We have been advised by counsel that the burden on the accused probably constitutes a violation of section 11(d) of the Charter.

The provisions concerning the exhibition, sale and rental of erotica require that, when an educational purpose is claimed, the erotica must be sold for that educational purpose: s. 159.5(b).

Is it the purpose of the vendor that is at issue here, or of the purchaser? Must the vendor demonstrate that their motives are purely philanthropic, rather than commercial? Or, is the vendor responsible for the motives of the purchaser? If so, how is the vendor to ascertain the intentions of the purchaser?

"Artistic merit" (s. 159.1, 159.6, 159.8, 163.5) is a hopelessly elusive thing to define. History is full of examples of artists who were believed to have no ability in their time. How is this to be judged? And why should judges, whose training is in law, be considered competent to make the determination of what constitutes "artistic merit"?

A number of sections provide the accused with a defense if they took "all reasonable steps" to ensure the legality of their actions: s. 159.3, 159.6(a), 159.8(a). What constitutes "all reasonable steps" to ensure, for example, that no person depicted in a matter was, appeared to be, or was portrayed as being under the age of eighteen years: s. 159.3? Is a bookseller expected to read all the books sold in a store? Is a news vendor to read every classified advertisement to see whether prohibited activity is "advocated": see s. 138(b)? Even if questionable material is located, what is the person to do? Is seeking legal advice sufficient? Is seeking advice of the police sufficient? Is it necessary to launch an action in the Supreme Court for a declaration as to the merits of the work? Whether a person

appears to be or is portrayed as under eighteen is a matter of fact for the trial judge. The judicial determination is thus presumably the only safe course, but it is prohibitively expensive for an average news vendor, author, book seller or publisher.

VI. Seizures

There is no requirement that the police consider possible defenses prior to seizing material: s. 160(1). Police officers are under a duty to seize publications which appear to be pornographic, and matters of defense are to be left until later. For periodicals with a short shelf life, any profit to be had by the producers and sellers is thus forgone regardless of outcome, as by the time the publication is declared not to be pornography, the periodical is out of date. There will be selective enforcement. Police normally react to complaints. Alternatively, they may seize items which they find particularly offensive. There is no reason to believe that what the police find offensive will correspond to what parliament considers the most dangerous material, given the hopelessly confused ording of the bill.

The result is that inventory will be held for months awaiting a judicial determination under the proposed law. For periodicals, which have a relatively short shelf life, any profit

to be had by the producers and sellers is thus forgone, regardless of the outcome of the trial, as by the time the publication is declared not to be pornographic, the periodical is out of date.

The production of books represents a huge financial investment for a publisher, and booksellers make a comparable investment in building an inventory. The detention of stocks of books is ruinous to the cash flow of these businesses. If Canada Customs is any indicator, delays will be a major problem. Articles seized by Customs are held for weeks or months awaiting determination as to their admissibility. In a recent case where an appeal to the courts was eventually successful, the time between seizure and eventual disposition in court was approximately ten months. Even when the accused "wins", therefore, and the publication is found not to be pornographic, the financial consequences of the seizure are drastic. If the accused finally loses, the items are forfeit and the entire investment is lost. This is an unjustifiable result, given that we will be unable to ascertain prior to publication with any degree of certainty what an eventual verdict might be.

VII. How will it Change Our Life?

"Dealing" in books and periodicals, as author, publisher, distributor, or seller, is a business. All of these businesses

operate notoriously close to economic collapse. Particularly in the realm of artistic work, the issue is frequently not how much money can be made, but how little can be lost.

Compare that to the economics of a criminal trial. A recent challenge to the exclusion of a book under the Customs Tarriff Act. The book at issue was a popular sexual education work, which had been available in Canada for ten years. Four expert witnesses for the applicant were required, and the case took four hearing days in court. Expert witnesses cost roughly \$1000 each, and counsel fee during the hearing is roughly \$1000 to \$2000 per day. Preparation time is extra. Such a case would normally be expected to cost approximately \$15,000 to \$20,000. Add to this the overhead cost of the material being detained for months, awaiting the hearing. The cost of a criminal trial would be ruinous to most "dealers". Costs cannot be recovered in a criminal proceeding, even if the accused successfully defends the charge. Costs of appeals are not included in these calculations, and under the proposed legislation, these appeals will be complex and costly.

The result is that legitimate expression will be stifled, because authors, publishers, distributors, and sellers cannot afford the risk of a lawsuit. We will be forced to assume the narrowest meanings of the terms, and that will effectively terminate the public discussion of sexual issues. The proposed

law will create a chilling effect which will be felt throughout the industry.

VIII. Libraries

Huge expenditures will be necessary for libraries and bookstores to evaluate current holdings to ascertain whether any of the material now held is 'pornographic' or 'erotic'. Reference libraries may easily contain hundreds of thousands of titles, and the evaluation of current holdings for them would be a monumental task. Materials eventually found to be arguably 'erotic' would have to be moved to separate rooms. The costs of building alterations, book relocation, and re-cataloguing of the collections would be astronomical. This would pose a particular problem given the economics of the 1980's. Both public and academic libraries are currently understaffed as the result of fiscal restraints. There is not enough money to fulfill the current mandate of these facilities, let alone to perform the re-classification implied by the proposed legislation.

Even if it were feasible, the result would be inappropriate. Portions of libraries would have to be restricted to persons over the age of eighteen. This is opposed to the current accepted professional standards concerning labelling in libraries. As a clearly offensive instance, it is inappropriate that university

libraries have books which are available to students over the age of eighteen, but not to students who are under eighteen.

IX. Conclusions

Bill 54 is a threat to the publication and distribution of books in this country. Its passage would result in important fiction and non-fiction ceasing to be available in this country, both because of the legal threat that enlightened discourse on sexual topics may now be a criminal offence, and also because the possibility of criminal law suits creates a sufficient economic threat that the producers of books and periodicals cannot afford to risk expression.

BPDC requests that the bill be withdrawn.

Background Materials for Parliamentary Brief on Bill C-54

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The Community Standards Test of Obscenity

Cynthia A. MacDougall

I. Introduction

The heart of the *Criminal Code's* obscenity provisions is the judicially created community standards test. Presently, the definition of obscenity essentially requires that a court find that a dominant characteristic of the offending material is the *undue* exploitation of sex.¹ The court determines *undueness* by considering community standards of taste. The position of this paper is that the community standards test should not be an element of the definition of obscenity because it lead to arbitrary, inconsistent jurisprudence; and, to borrow from Borins Co. Ct. J. in *Rankine*,² the legislature cannot credibly expect a trier of fact to have his finger on the "pornographic pulse of the nation."

There are two basic and distinct objectives which the government can attempt to achieve by legislating in the area of obscenity. The first objective is the control of obscene material because it is believed to be a public nuisance. Dworkin has aptly referred to this as the prevention of "disgust-harm".³ The second objective is the control of obscene material because it is understood to be a form of hate literature which degrades women; the material condones the exploitation of women and/or promotes their exploitation.

Obscenity as a public nuisance is typified by the Law Reform Commission of Canada's view of the present notion of obscenity:

What lies then at the root of our present notion of obscenity? Two things it seems. Obscenity somehow has to do with sex. It also has to do with revealing things we don't like seeing, for reasons which perhaps we can't explain - it just offends, we feel it inappropriate.⁴

If the legislature's intention is to prevent disgust-harm, the definition of obscenity must be reformulated so that the definition itself meaningfully identifies community standards. The use of juries, expert evidence, or perhaps an administrative board, may increase the credibility of a community standards test; however, these techniques should not be used in place of an articulate definition. If a single comprehensible definition of obscenity is an impossibility because of the nature

1. *Criminal Code*, R.S.C. 1970, c. C-34, see ss. 159-65 [hereinafter the *Code*].

2. *R. v. Rankine Co. Ltd.*, an unreported judgment of the Ont. Co. Ct., Oct. 24, 1983.

3. Dworkin, "Is There a Right to Pornography" (1981), 1 Oxford J. Leg. Studies 177.

4. *Limits of Criminal Law, Obscenity: A Test Case*, Working Paper 10 (Ottawa: Information Canada, 1975) at 9.

of the objective to be achieved, there are more effective alternative methods to prevent disgust-harm which do not necessarily require the sanction of a criminal law.

In terms of the second possible objective, pornography has recently been described as a form of hate literature which degrades women. This position is reflected in the writings of Dworkin and MacKinnon:

Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. This harm includes, dehumanization, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment.⁵

The present definition of obscenity can encompass pornography as a form of hate literature. However, the community standards test, besides suffering from the aforementioned weaknesses, is incompatible with the second objective. From a humanist perspective, if the objective of the legislation is to prohibit what is considered to be sexist, one does not look to the community standards of tolerance when the society is perceived to generally tolerate sexism.

The obscenity provisions of the *Criminal Code* have not been tested constitutionally. This paper will not explore whether the obscenity provisions infringe the principle of freedom of expression, or whether the government can or should be able to demonstrably justify the obscenity provisions to be a reasonable limit in a free and democratic society.⁶ However, the lack of a clear definition obviously does enhance the argument that the provisions are a reasonable limit on the freedom of expression. The public and the courts should know with greater certainty what material is prohibited and the reasons for the prohibition in order to engage in an intelligent constitutional debate.

II. The Present Law in Canada

Possession of obscene material is not, in itself, an offence under the *Code*. The offences created by section 159 are the making, printing, publishing, distributing or circulating obscene material, or possession for the purpose of achieving the aforementioned results.⁷ Selling and exposing to public view obscene materials are also offences.⁸ Section 160 provides for the seizure, forfeiture and disposal of obscene materials. Persons involved in the presentation of obscene performances, entertainment or representations may be subject to a criminal charge pursuant to section 163. Mailing obscene material is also an offence.⁹

Section 159(8) of the *Criminal Code* defines obscene as:

5. Dworkin, MacKinnon, "A Pornography Ordinance developed for the City of Minneapolis".
6. See: *Constitution Act, 1982*, Part 1, as enacted by the *Canada Act 1982*, c. 11 (U.K.), s. 1.

7. The *Code*, s. 159(1).

8. The *Code*, s. 159(2).

9. The *Code*, s. 164.

any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

The definition of obscenity requires that the material be sexual. For example, the picture of a clothed woman in a meat grinder has little to do with sex, and would not be prohibited as obscene because of the requirement that there be the undue exploitation of sex and violence. Responding to the public concern that violent material which does not depict sex is not captured by the present definition of obscenity, an amendment to the present definition has been introduced in the House of Commons.¹⁰ The proposed amendment removes the need for the link between sex, and crime, horror, cruelty or violence. Degradation is added to the list of prohibited subject matters. The amendment reads:

For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any or more of the following subjects, namely, sex, violence, crime, horror or cruelty, through degrading representations of a male or female person or in any other manner.

The proposed amendment is commendable from the perspective of recognizing that some members of the community find violent material equally or more offensive than sexually explicit material. Unfortunately, the community standards test has been left untouched, along with its inherent difficulties.

The present definition has suffered much criticism since its introduction in 1959,¹¹ notwithstanding the hope that the new definition would be more workable than the common law *Hicklin* test which asked:

whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.¹²

The clarity that has been evoked by the 1959 definition is captured in the first Supreme Court of Canada decision of *R. v. Brodie*,¹³ where the nine member court was divided on whether the *Hicklin* test had been replaced or merely supplemented by the *Criminal Code* amendment. Four of the nine judges determined that the *Hicklin* test was ousted, two judges thought that the statutory definition was a supplement, and three left the matter open. In 1977, the Supreme Court of Canada again considered this issue in *Dechow v. The Queen*¹⁴ and a five to four majority held the definition was exhaustive in its application to "publications" and did not decide if the *Hicklin* test would apply to material which was not a publication. "Publications" has been widely interpreted by the courts to include both films and video tapes.¹⁵

10. *An Act to Amend the Criminal Code*, Bill C-19, 1984 (32 Parl. 2d Sess.) clause 36.

11. *An Act to Amend the Criminal Code*, S.C. 1959, c. 41, s. 11.

12. *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 at 371.

13. [1962] S.C.R. 681, 32 D.L.R. (2d) 507, 132 C.C.C. 161.

14. [1978] 1 S.C.R. 951, 76 D.L.R. (3d) 1, 35 C.C.C. (2d) 122.

15. See: *R. v. Odeon Morton Theatres Ltd.*, [1974] 3 W.W.R. 304, 16 C.C.C. (2d) 185 (Man. C.A.); *R. v. Times Square Cinema*, [1971] 3 O.R. 688, 4 C.C.C. (2d) 229 (C.A.).

A neat outline of the factors which have influenced a finding that a dominant characteristic of a publication is the undue exploitation of sex or sex and any one of the listed subjects is not possible. Barnett carefully analyzed the judicial interpretation of obscenity and the conclusion he reached was that while the formula for determining what was obscene was discussed and developed in the abstract, it has been applied "only by way of a salutary genuflection, usually to the concealment of whatever real reason the tribunal may have had for its decision."¹⁶ As stated by Fox:

Judicial interpretative glosses upon this provision have provided a morass of verbiage whose practical effect is to make the subjective personal reaction of the individual members of the court the overriding factor in the judicial evaluation of obscenity.¹⁷

Notwithstanding the aforementioned views, a number of considerations which have been cited in decisions can be identified. The first question to be asked is whether the material before the court has a dominant characteristic of sex, or sex and any one of the listed subjects; sex need not be *the* dominant characteristic. The dominant characteristic question involves the court in examining the work as a whole to determine what the creator's artistic purpose was ("dirt for dirt's sake?") and the work's literary and/or artistic merit. The second and most important question is whether or not the exploitation is "undue". Undueness is established by considering what the community standard is: that is, what the average Canadian believes to be offensive. Undueness has also involved consideration of the purposes of the publication's creator and artistic merit. The importance of community standards is reflected in *R. v. Cameron*, where the Ontario Court of Appeal held that while relevance was an aspect to be considered, where there was "a clear and unequivocal offence against those standards, obscenity is established and artistic merit will not obliterate it."¹⁸

The concept of community standards was introduced as the test of "undueness" by Judson J., in the Supreme Court of Canada judgment which found that *Lady Chatterley's Lover* by D.H. Lawrence was not an obscene publication.¹⁹ While he recognized criticism of community standards, he was the choice as follows:

Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion - and even that must be subject to some influence from contemporary standards - or the instructions must be that the tribunal of facts should consciously attempt to apply these standards. Of the two, I think that the second is the better choice.²⁰

In *Dominion News and Gifts (1962) Ltd. v. The Queen*,²¹ the Supreme Court of Canada unanimously adopted the reasoning of Freedman J.A. of the Manitoba Court of Appeal. Freedman J.A. had held that a large readership is not always an

16. Barnett, "Obscenity and s. 150(8) of the Criminal Code" (1969-70), 12 Crim. L.Q. 10 at 27.

17. Fox, *Study Paper on Obscenity* (Ottawa: Law Reform Commission of Canada, 1972) at 2.

18. [1966] 2 O.R. 777, 58 D.L.R. (2d) 486, 4 C.C.C. 273 at 284, leave to appeal denied, [1967] S.C.R. v.

19. Brodie, *supra* note 13.

20. *Id.* at 182 (C.C.C.).

21. [1963] 42 W.W.R. 65, 2 C.C.C. 103 (Man. C.A.), *rev'd* [1964] S.C.R. 251, 3 C.C.C. 1.

entirely irrelevant factor because it may have to be taken into account when seeking to identify the standards of the community. His treatment of community standards was as follows:

These standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular judge who happens to be trying the case.²²

Freedman J.A. also held that the community standards test is to be a Canadian test, and other cases have confirmed that the standard to be applied is national.²³

Perhaps a community standards test is reasonable in comparison with the alternative of permitting a judge to elevate his personal biases into law. The judicial creation of the community standards test is understandable because a definition of obscenity, based on "undueness", offers little guidance to what is obscene. Furthermore, since the *Criminal Code* is a federal statute, it is reasonable that the community standard has been held to be national. However, if the definition of obscenity as it relates to the purpose of the law is reconsidered, the choice is not limited to personal biases versus "objective" Canadian community standards.

III. Obscenity as a Public Nuisance

The purpose of the present obscenity provisions appears to be the prevention of obscenity as a public nuisance because of the community standards inquiry. Determining what exceeds the community's tolerance is not equivalent to identifying material that has a casual relationship with anti-social conduct, nor determining what material is a form of hate literature against women. This part of the paper will examine the community standards test from the perspective of preventing the public nuisance aspects of obscene material or preventing disgust-harm.

The public nuisance perspective of obscenity supports the concept of "freedom from obscenity". This was the position of the Law Reform Commission of Canada in 1975, which described *public* obscenity as a public nuisance because obscenity offended society's values of sex, privacy and human dignity.²⁴ The Commission stated:

Public obscenity clearly has significance - it annoys, disgusts, offends. As such it merits just as much and just as little place within the criminal law as other species of nuisance.

22. *Id.* at 116 (2 C.C.C. 103).

23. *Cameron*, *supra* note 18; *R. v. Duthie Books Ltd.* (1967), 58 D.L.R. (2d) 274, 50 C.R. 55, 1 C.C.C. 254 (B.C.C.A.).

24. *Supra*, note 4.

Loud noises, nauseating smells and so on aren't anything like as serious as murder. But still they do make life less tolerable and so we use the criminal law against them to a limited degree.²⁵

The Commission recommended that the criminal law not be used against the private consumption of obscenity by adults. The Commission believed that the dangers associated with consumption, such as its link to violent conduct, are unclear and unproven.²⁶ At present, the criminal law does not explicitly distinguish between public and private consumption. Undoubtedly, the context of the alleged obscene material does have impact upon the community standards determination, which includes a notion of what is acceptable for "private" use. As held by the Ontario Court of Appeal in *R. v. Sudbury News Services Ltd.*, "the manner and circumstances of distribution are relevant in determining whether the standards of tolerance by the Canadian Community have been exceeded."²⁷

There is no doubt that community standards are relevant if the purpose of the legislation is to control obscenity as a public nuisance. However, this should not be achieved by way of an obscenity definition dependent upon a court's interpretation of what the average Canadian's taste and feelings are about a particular presentation. The confusion caused by the original Hicklin test of obscenity was unavoidable because of the nature of investigation required. Evaluating material based on its tendency to deprave and corrupt minds requires abilities not normally associated with the judiciary.²⁸ The community standards test is not a significant improvement.

Perhaps one could argue that courts are equipped to make the community standard assessment because Mr./Mrs. Mainstream Canada are close relatives of the reasonable man of negligence law. The tasks are different in form and, more importantly, distinctly different in effect. In a negligence action, a court is faced with a particular set of circumstances and a supposed failure to act or a specific action on the part of the defendant. The defendant's conduct is compared to that of the reasonable man. The result of the action governs the plaintiff and the defendant only. Whereas when a court is ascertaining the community standard, the court is not concerned with what the defendant ought to have done, but what the community *actually* thinks of the so called obscene material. The result of the action has an impact upon the entire community; what material the public will have an opportunity to have access to if they so choose.

The test of community standards has resulted in inconsistent and unpredictable jurisprudence. The use of a community standards test conflicts with the policies endorsed by the Canadian government in the *Criminal Law in Canadian Society*.²⁹ Furthermore, the courts cannot credibly make this determination, even with the use of juries or experts, nor can an administrative board.

25. *Id.* at 40.

26. *Id.* at 43-4.

27. (1978), 18 O.R. (2d) 428, 39 C.C.C. (2d) 1 at 10.

28. Report of the Committee on Obscenity and Film Censorship (*Williams Report*) (Cmnd. 7772, 1979) at 9-12 for a discussion of the "deprave and corrupt test".

29. *Criminal Law in Canadian Society* (Ottawa: n. pub., 1982).

If the object is to implement community standards, a meaningful definition of what is obscene should be articulated. The court should be directed by the legislature as to what kind of material should never be exposed to the public under any circumstances and/or what kind of material may be exposed under specified circumstances. Without this direction, obscenity should not be prohibited. Accompanying this definition, a variety of techniques can be relied upon to control the public nuisance aspects of obscenity.

1. Unpredictable and Inconsistent Jurisprudence

The court's use of the objective community standards test has not produced consistent and predictable jurisprudence. The case law is replete with conflicting views of community standards. The result of the test is, in essence, a subjective view of what the community standard is.

The unpredictability of the obscenity definition is evident in the 1962 Supreme Court of Canada decision of *R. v. Brodie*,³⁰ where a five to four majority ruled that *Lady Chatterley's Lover* was not an obscene publication. The response of the judges suggests that they were not reading the same book. Quoting from the case's headnote, Fauteux J. found the book to be:

replete with description in minute detail of sexual acts which utilize filthy degrading terms. Any literary merit the book may have is far out-weighted by the pornographic and smoltry passages so that the book, taken as a whole, is an obscene and filthy publication.³¹

Yet, Judson J. described the book as a serious and honest novel without excessive emphasis on the theme of sex, which did not offend contemporary standards of decency.³²

A more recent example of the inconsistent results associated with the community standards test is the divergence between two cases, *R. v. Cinema International Canada Ltd.*³³ a decision of the Manitoba Court of Appeal, and *R. v. Rankine*³⁴ an Ontario County Court decision. In *R. v. Cinema*, two films were judged to exceed the limits of tolerance according to contemporary community standards. The films were described by Philip Co.Ct.J. as follows:

Both films have a striking similarity in their presentation. Both have prolonged scenes of male and female nudity, and of explicit or vividly simulated acts of sexual intercourse, fellatio, cunnilingus and masturbation. Both have scenes of homosexual encounters between females, and of sexual activities engaged in simultaneously by a male and two females. In each there is an orgy scene of group sex in which a multitude of sexual activities are displayed.³⁵

In contrast, the community tolerance level in *R. v. Rankine* was found by Borins Co.Ct.J. to be quite different:

30. *Supra* note 13.

31. *Id.* at 163 (C.C.C.).

32. *Id.*

33. (1982), 13 Man. R. (2d) 335.

34. *Rankine*, *supra* note 2.

35. *Supra* note 33 at 339.

in my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence, cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed exceed the level of community tolerance. Most of the films which I have found to be obscene fall into this category. As for the other films which I am satisfied are obscene and which do not contain scenes of sex and violence and cruelty, it is the degree of explicitness of the sexual acts which leads me to the conclusion that they exceed community standards. In films of this nature it is impossible to define with any precision where the line is to be drawn. To do so would be to attempt to define what may be undefinable.³⁶

The Canadian standard of tolerance could not have so radically altered between February 23, 1982, the date of the Manitoba Court of Appeal judgment, and October 24, 1983, the date of the Ontario County Court judgment. Which decision is the correct view of community tolerance is unknown. Also, the future unpredictability of applying the *Rankine* view of obscenity is apparent from the aforementioned discussion of *Borins Co.Ct.J.* A "degree of explicitness which is undefinable" offers little guidance to future courts or the public at large.

2. The Criminal Law in Canadian Society

The Canadian government endorsed a comprehensive set of policies applicable to the criminal law in *The Criminal Law in Canadian Society*. Two policies of particular relevance are:

- (1) There should be a pruning of the criminal law so that it deals with conduct that causes or threatens only serious harm to individuals and society, and when other less coercive and less intrusive means do not work or are inappropriate.
- (2) The criminal law should clearly and accessibly set forth the nature of the conduct declared criminal.³⁷

The determination of what constitutes "serious" harm is a value-laden process. It is not self-evident that the public nuisance perspective of obscenity justifies the use of the criminal law because it causes serious harm. Assuming serious harm because of the desire to avoid this debate, it must be recognized that other types of public nuisances are not regulated by the criminal law, such as littering. Thus, if the criminal law is to be used, it is of considerable importance that the definition of obscenity should clearly and accessibly set forth the nature of the conduct declared criminal.

Given the uncertainty of what are in fact the community standards, and the uncertainty as to what the court will determine the community standards actually to be, obscenity offences do not clearly and accessibly set forth the nature of the conduct declared criminal. While the argument can be made that those in the business of distributing "questionable" material should take the risk that the material

36. *Rankine*, *supra* note 2 at 28.

37. *Supra* note 29 at 52-3.

might be found obscene, this does not satisfactorily meet the aforementioned principle. Furthermore, it is not clear why potential obscenity offenders should be treated differently from other potential offenders of the criminal law. The business risk argument would be more persuasive if the government created a regulatory framework with specified standards. Since the criminal law is the most coercive form of state intervention, the degree of uncertainty associated with the present definition of obscenity is not acceptable.

3. Modifications to Improve the Present Test

Modifications to the present treatment of the community standards test which may improve the court's ability to determine community standards include: the mandatory use of a jury, the use of expert evidence and/or social service data, and the creation of a distinct administrative body that is responsible for identifying the community standard of tolerance. All three modifications fail to achieve the credibility associated with a meaningful definition of obscenity articulated by the legislature. The definition should identify community standards rather than delegate the task to the courts.

a) Juries

Hunter has stated that a jury trial:

is the only honest procedure if we are to continue to pay lipservice to judging offensive literature by a "contemporary community standards" test... who could be less qualified than Judges, uniformly drawn as they are from the same background, education and career, to discern it?³⁸

According to Hunter, juries are more representative, practical and sensible, and the best alternative for sensing and applying the shifting moral standards of a community. Juries are probably better suited for credibly gauging community standards than judges. However, it is unclear that a jury drawn from a rural town in the west coast would arrive at the same conclusion as a jury drawn from a major city located in central Canada. The present problems of inconsistent and unpredictable jurisprudence would still exist.

Hunter's response to this weakness is that the test should be a local one, as opposed to a national one.³⁹ While there are strong doubts associated with a simple Canadian standard effectively preventing disgust-harm in communities throughout Canada, the incorporation of local standards would be problematic. Would "local" be defined in terms of municipal areas, or provinces? Distributors of material would face a draconian law if an offence would be committed by distributing material in one town, while distributing material in a neighbouring town would be acceptable. This approach would not provide for the clear and accessible definition of criminal conduct as earlier discussed. A province is not composed of homogeneous communities. A provincial standard would not have the benefits of providing local communities with control over obscenity as a public nuisance. It appears that if obscenity is to be prohibited by the federal criminal law, a national test must be retained.

38. Hunter, "Obscenity, Pornography and Law Reform" (1975-76), 2 Dalhousie L.J. 482 at 502.
39. *Id.* at 503.

b) Expert Evidence

Expert evidence and social survey data are two techniques to aid the courts in determining community standards, whether by a judge or jury. The use of expert evidence by the courts has varied widely. While courts have stated that expert evidence is of considerable assistance,⁴⁰ courts have also held that:

while evidence with respect to community standards is admissible and helpful, it is not a fact which the Crown is obliged to prove as part of its case.⁴¹

In terms of social survey data, Fox⁴² noted that the courts have shown a willingness to admit properly introduced social survey data to resolve the issue of community standards. However, there does not appear a case where there was a determination of community standards based on social survey data.

There is little doubt that experts can have a strong influence on the trier of fact. *Rankine* is a good illustration, *Borins Co.Ct.J.* was obviously impressed by the testimony of an alderman for the City of Toronto, Mrs. June Rowlands. It is interesting to note the basis of Mrs. Rowland's expertise in the case of *Rankine* *Borins Co.Ct.J.* stated:

Of course, Mrs. Rowlands did not conduct any surveys. However, as an elected Alderman in the City of Toronto and a member of various committees, organizations and boards in Metropolitan Toronto she has had the opportunity to meet and speak to many people and is in a very good position to offer her opinion with respect to community standards in Metropolitan Toronto.⁴³

In terms of experts without the benefit of social survey data, Mrs. Rowlands was probably as well-qualified to advise the court of community standards as could be reasonably demanded. This provides little reassurance when equally well-qualified experts can offer opposite opinions.

Mrs. Rowlands had testified:

The contemporary community of Metropolitan Toronto would tolerate the following elements in a video cassette tape: explicit scenes of oral sex, masturbation, sexual intercourse and group sex involving three or more people, voyeurism and offensive language. However she was of the opinion that the following elements would exceed the level of community tolerance in Metropolitan Toronto: scenes of men ejaculating on women's faces, penetration of the vagina by foreign objects such as corn cobs, explicit scenes of buggery, a woman urinating into a pot, a man inserting a candle into his anus, sexual intercourse with women portrayed as young girls, and scenes of sexual intercourse coupled with cruelty and violence.⁴⁴

The influence of this testimony is revealed in *Borins Co.Ct.J.*'s earlier quoted discussion of community standards, where explicitly sexuality in itself was generally acceptable, but sexual violence was held to be beyond community standards of tolerance.

40. *Sudbury News Service*, *supra* note 27.

41. *R. v. Popert* (1981), 19 C.R. (3d) 393, 58 C.C.C. (2d) 505 at 508 (Ont. C.A.).

42. "Criminal Law-Survey Evidence in Community Standards Obscenity Prosecutions" (1972); *Can. Bar. Rev.* 315.

43. *Rankine*, *supra* note 2 at 6.

44. *Id.* at 7.

If experts based their opinions on social survey data, the quality of the information received by the court would be greatly increased. Perhaps there should be a requirement that the Crown commission a survey, with a scientifically acceptable sample group, in order that Canadians' views would be captured. Yet, it is unlikely that such a suggestion would be economically feasible, and the problem of the unpredictability of the offence would remain. Furthermore, survey research still requires interpretation, which is not a purely objective exercise.

c) An Administrative Board

The reliance on an administrative board to determine community standards is an interesting alternative to the use of experts and juries. New Zealand has an administrative board which was established in 1963, known as the Indecent Publications Tribunal. The *Indecent Publications Act*⁴⁵ goes so far as to specify the qualifications of the tribunal's members. The chairman of the tribunal must be an experienced lawyer, and two of the four other members must be qualified in literature or education. The New Zealand definition of indecent is comparable to the Canadian definition of obscene.⁴⁶ Courts must refer the issue of whether or not certain material is indecent to the tribunal for determination. The tribunal's findings can only be overturned by the Supreme Court on appeal.

Administrative boards are generally thought to be preferable to courts if specialized expertise is required. An administrative board would promote consistency and predictability; also, an administrative board could provide opinions on the acceptability of material before criminal charges were laid. Yet without political accountability, an administrative board can no more credibly determine community standards than a judge, jury, or expert. While there are advantages to an administrative board, a meaningful definition of obscenity is still necessary to avoid arbitrary decision making.

Alternatives to the Obscenity Definition

Any definition which is drafted to prevent obscenity as a public nuisance will have problems of interpretation. Since the manner of display is relevant, it is difficult to foresee all possible forms of exposure and specifically state what will not be tolerated. Yet the definition can avoid the problems associated with a community standards test if it identifies a narrow class of material which will never be tolerated in public and/or private places, and relies on other techniques to regulate obscene material. It is possible to develop a meaningful definition. For example, the Williams Committee Report on Obscenity and Film Censorship recommended that the following material be prohibited:

19. Prohibited material should consist of photographs and films whose production appears to the court to have involved the exploitation for sexual purposes of any person where either

45. *Indecent Publications Act*, 1963 (N.Z.)

46. Indecent is defined as including "describing, depicting, expressing or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good."

- (a) that person appears from the evidence as a whole to have been at the relevant time under the age of sixteen, or
- (b) the material gives reason to believe that actual physical harm was inflicted on that person.⁴⁷

While Section 19(b) is somewhat difficult to interpret, the committee was not concerned that simulated violence which appeared realistic may be prohibited. Alternatively, the definition could list certain acts which are considered obscene, for example, the depiction of bestiality, and faecal or urinary functions. A definition is possible, once the drafter is given a clear mandate to prohibit specified material which the community will not tolerate.

Techniques which can regulate obscene presentations to avoid disgust-harm are numerous. Local communities can implement their values through zoning by-laws which regulate where defined material can be sold. By-laws can be innovative and specify the manner in which obscene magazines are to be displayed, to prevent unwanted exposure.⁴⁸ Administrative boards can classify films and video tapes so that audiences can avoid material they find offensive. The Canadian Radio-Television and Telecommunications Commission has regulations which set programming standards.⁴⁹ All of these techniques do not require the coercion of the criminal law. Yet they will probably contribute to the credible implementation of actual community values, far more than prosecution under the *Criminal Code* which depends on a court's perception of the Canadian standard of tolerance.

IV. Pornography as Hate Literature

Recently, the argument has been made that pornographic and erotic material should be treated differently by the criminal law, rather than being grouped under the heading of obscenity. Pornography, unlike erotica, is a form of hate literature, directed against women. Hunter⁵⁰ has adopted this position, as well as feminists such as Ridington,⁵¹ and the Metro Task Force on Public Violence Against Women and Children.⁵² The distinction that is usually drawn between pornography and erotica is qualitative; erotica conveys consensual, mutual and enjoyable sexual relations, while pornography is the presentation of sexual abuse, degradation, humiliation or violence. This part of the paper will consider the relevance of determining community standards if the purpose of the obscenity offence is to prevent the dissemination of pornography as hate literature against women. While it will be argued that the present obscenity definition can encompass pornographic material, a community standards test is inconsistent with an offence of

47. *Supra* note 28 at 161.

48. See for example: Metropolitan Toronto Bylaws 41-83 and 82-83, which deal with *inter alia*, the height at which sexually explicit magazines must be displayed.

49. See for example: *Television Broadcasting Regulations*, C.R.C./381 as amended by S.O.R./82-415 and S.O.R./82-533.

50. *Supra* note 38.

51. Ridington, *Freedom From Harm or Freedom of Speech?: A Feminist Perspective on the Regulation of Pornography* (Ottawa: National Association of Women and the Law, 1983).

52. *Task Force on Public Violence Against Women and Children, Final Report*, (Toronto: n. pub., 1984).

pornography from hate literature perspective, however pornography is defined. Also, the weaknesses with a community standards test which were identified in relation to obscenity as a public nuisance, still remain.

The Metro Task Force on Public Violence Against Women and Children recommended that the following definition of pornography be included in the *Criminal Code* as the basis of an offence:

Pornography is any printed, visual, audio or otherwise represented presentation, or part thereof of violence in a sexual context, or the presentation of sexual acts with a theme of violence, including the depiction of submission, coercion, lack of consent, or debasement of any human being, which presentation or depiction may include but is not necessarily restricted to:

- (a) violence associated with sexual acts, which violence need not occur simultaneously with the sexual act or acts; or
- (b) violence in conjunction with emphasis on the sexual parts of the body, whether nude or not; or
- (c) violence in conjunction with emphasis on nude parts of the body, whether sexual or not.⁵³

This definition has been chosen for discussion purposes only, because of its focus on violent sex. Depictions of explicit sexuality are not caught by the definition, nor are depictions of violence without any sexual associations. As with any definition, it can be criticized for being too vague. However, every definition requires interpretation to implement the drafter's intention. Interpreting a statute is not the same exercise as determining whether the community would tolerate a specific presentation.

The present and proposed obscenity definitions can capture the definition of sexual violence proposed by the Metro Task Force, if a judge or jury deems that such a presentation is undue, or violates community standards. *R. v. Rankine* is an obvious example where Borins Co.Ct.J. found that:

films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed exceed the level of community tolerance.⁵⁴

Of considerable concern is the uncertainty that future courts will perceive the community standard in the same way so as to provide consistent jurisprudence which finds pornography, as a type of violence, within the definition of obscenity. If the desire is to prohibit pornography, an obscenity definition must be drafted so as to not leave the prohibition dependent upon a court's perception of community standards.

The motivation for prohibiting hate literature against women is also not compatible with a community standards test. This is apparent if the present hate literature provisions of the *Criminal Code* are examined. Prior to the enactment of the

53. *Id.* at 64.

54. *Rankine*, *supra* note 2 at 28.

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provisions, the Cohen Committee⁵⁵ had recommended that the communication of statements promoting hatred against any identifiable group (which is so defined so as to not include women) be an offence. The rationale for the defence was as follows:

It sets out as a solemn public judgment that the holding up of identifiable groups to hatred or contempt is inherently likely to dispose the rest of the public to violence against the members of these groups and inherently likely to expose them to loss of respect among their fellow men.⁵⁶

Section 281.2 of the *Criminal Code* provides:

Every one who, by communicating statements, other than in private conversations, wilfully promotes hatred against any identifiable group (is guilty of an offence).⁵⁷

"Communicating" includes communicating by telephone, broadcasting or other audible or visible means. "Identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

If hate literature had to offend the actual community standards of tolerance as it relates to racism, there is a distinct possibility that all "identifiable groups" would not receive equal protection from hate literature. Community tolerance is irrelevant, because the legislature has identified that the wilful promotion of hatred is an offence. Similarly, if pornography is defined as proposed by the Metro Task Force, a tolerance to community standards would be superfluous because the definition embodies (or should embody) the community's belief that the described material should be prohibited.

V. Conclusion

The courts cannot credibly determine what the community's tolerance is to various forms of obscene and pornographic material. If the intention of the legislature is to use the criminal law to prevent disgust-harm, the legislature should clearly and accessibly identify the material to be prohibited. Less coercive and intrusive means should be considered to provide communities with the ability to regulate obscenity as a public nuisance. If the intention of the legislature is to use the criminal law to prohibit pornography as a form of hate literature, a new definition is required which deletes the community standards test. These two purposes are not the only possible objects of an obscenity law. Whatever the intention of the legislature, the result to be achieved should be articulated, and the definition of obscene material must be described by the legislature, rather than demanding that a court have its finger on the "pornographic pulse" of the nation.

55. Can., *Report of the Special Committee on Hate Propaganda in Canada* (Cohen Committee Report) (Ottawa: Queen's Printer, 1966).

56. *Id.* at 64.

57. The Code.

The regulation is unambiguous and it is mandatory. Short of disregarding the law, the Commission cannot take present or former residency into account. And if the Commission were to disregard the law, administrative law remedies would be available. But for purposes of constitutional analysis, it must be assumed that the Commission will respect its mandate.

I conclude that the challenged enactments do not erect a barrier to inter-provincial mobility by establishing or permitting a preference toward applicants for practitioner numbers who are or were residents of the province.

In summary, I find that the three questions presented by s.6(2)(b) in these proceedings must be answered in the negative. It follows that the constitutional challenge based on s.6 of the Charter cannot succeed.

6. CHARTER, S.7: THE RIGHT TO LIBERTY

This Charter provision states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

For the purposes of these proceedings, the terms of s.7 raise two questions. Do the challenged enactments infringe or deny the petitioners' right to liberty? If so, has any of the petitioners been deprived of his or her right to liberty otherwise than in accordance with the principles of fundamental justice? If the first question is answered in the negative, the second does not arise.

It is necessary to consider at the outset whether the petitioners assert the kind of right which falls within the scope of the right to liberty set out in s.7. They contend that every qualified physician wishing to practise medicine in the province has the constitutional right to do so, and at the location of his or her choice. Further, because it is not economically feasible to engage in fee-for-service practice in this province without ability to bill the Plan, the petitioners say that the right to engage in professional practice necessarily carries a concomitant right to payment from the Plan for professional services rendered to insured patients. The constitutional right to liberty, it is said, comprehends the right to offer professional services anywhere in the provincial market place and to be compensated for such services from a publicly funded and administered insurance scheme.

The core issue can be defined more succinctly. Does the Charter's right to liberty clause guarantee a right to work? Unless it does, one does not reach second echelon issues such as whether the clause also guarantees the right to be paid for such work from public funds and the right to perform work free of statutorily mandated geographic restrictions.

For purposes of classifying rights and freedoms, the right to work is commonly, if not invariably, characterized as an economic right. There is now a considerable body of case authority bearing on the question of whether the right to liberty clause confers or protects economic rights generally or the right to work in particular. Before turning to those decisions, some observations are in order about the setting which the Charter provides for the right to liberty clause.

Sections 7 to 14 of the Charter are grouped under the heading of "Legal Rights". Such heading, while not controlling, is an integral part of the Charter and properly considered as a guide to the intention of the framers of that document: Law Society of Upper Canada v. Skapinker, *supra*, at 370-77. In Reference re Section 94(2) of the Motor Vehicle Act (B.C.) [1985] 2 S.C.R. 486, Lamer J., delivering the principal judgment of the court, treated s.7 as dealing with the same kind of rights as ss. 8-14. He stated (at 502-03):

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s.7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s.7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

A common characteristic of the legal rights guaranteed by the Charter, Lamer J. pointed out, is that all have been recognized as "essential elements of a system for the administration of justice" (at 502). Sections 8 to 14 are primarily, although not exclusively, concerned with the administration of criminal justice: rights available to a person under investigation for, charged with, or convicted of, an offence. Some are available as well in connection with civil proceedings, such as the s.14 right to an interpreter. But whatever the scope of the legal rights set out in ss. 8 - 14, none are in the nature of economic rights. And in the case of s.7 itself, the companions of the

right to liberty clause are those respecting the right to life and the right to security of the person, neither of which is commonly associated with economic rights. So if the right to liberty clause transcends legal rights and embraces economic rights it is not because, but in spite, of any colouring that clause might be thought to acquire from the "Legal Rights" heading, from the rights with which it is immediately associated in s.7, and from the other legal rights set out in ss. 8 - 14.

It may be observed, as well, that the immediate context for the Charter's right to liberty clause is less hospitable to an assertion of economic rights than is the case for counterpart provisions in the Canadian Bill of Rights and the United States Bill of Rights. Section 1(b) of the Canadian Bill of Rights sets out the right not to be deprived of the enjoyment of property without due process of law and the Fifth and Fourteenth Amendments to the United States Constitution likewise speak of the right not to be deprived of the right to property without due process of law. The candidacy of a corresponding clause to guarantee this economic right in s.7 -- i.e. a right to the enjoyment of property -- was considered and rejected by the framers of the Charter. The close association of the right to liberty with the right to property in the U.S. Constitution provides one reason why the jurisprudence developed in that country does not necessarily provide a reliable guide to the scope of the right to liberty set out in s.7 of the Charter: R. v. Robson (1985) 19 D.L.R. (4th) 112, at 114 (B.C.C.A., per Nemetz C.J.). As to other reasons for exercising caution in applying American authorities on the right to liberty, see, e.g., R. v Neale (1986) 46 Alta. L.R. (2d) 225 (C.A.).

The foregoing comments relate to the immediate neighbours of the right to liberty clause grouped under the "Legal Rights" heading of the Charter. The place

occupied by those provisions collectively in the overall structure of the Charter provides another measure of their scope. The point is made by Professor Garant in The Canadian Charter of Rights and Freedoms: Commentary (1982; Tarnopolsky and Beaudoin, ed.) at 263:

The liberty of the person envisaged by s.7 must be distinguished from those liberties enumerated in s.2, which is also concerned with the person, but from its moral, spiritual or psychological aspect.

Certainly in a general sense one can conceive that the term "liberty" has a value with regard to all the rights and freedoms recognized by the charter. However, the structure of the Charter requires us to give the concept a residual and restrictive sense in considering s.7. Contrary to the Canadian Bill of Rights, which recognizes the right to liberty, in s.1, in a broad and introductory way, s.7 is concerned with the right to liberty following other dispositions which grant rights of a moral order, like the fundamental freedoms (s.2), democratic rights (ss. 3 to 5), and mobility rights (s.6). The "liberty" envisaged by s.7 is found in a section consecrated to "legal rights" and precedes ss. 8 to 14, which deal with various aspects of the rights of the physical person.

I turn now to the Charter cases relating to the applicability of the right to liberty clause to the sphere of economic endeavour in general and the right to work (or practise a profession) in particular. The petitioners place considerable reliance on the Mia decision, supra. There McEachern C.J. expressed the view that the scheme administered by the Commission prior to enactment of the impugned legislation violated the right to liberty contained in s.7. The petitioners point out that a decision of a judge of this court is ordinarily considered binding by other members of the court: Re Hansard Spruce Mills (1954) 13 W.W.R. (N.S.) 285 (B.C.S.C.). The respondents say that the consideration of Charter issues in Mia was unnecessary in view of the finding made on the administrative law point and consequently any

observations made with respect to s.7 (or s.6) of the Charter were obiter. Findings made obiter, they submit, are not binding on another member of this court and must be considered de novo: R. v. The Star Luzon [1984] 1 W.W.R. 527, at 535 (B.C.S.C.). Alternatively, even if the conclusions reached in Mia pertaining to the Charter were considered to form part of the ratio of that decision, the respondents rely upon the exception to the general rule recognized in the Hansard Spruce Mills decision itself to the effect that an earlier decision ought not to be followed where "subsequent decisions have affected the validity of the impugned judgment" (at 286). It is accordingly necessary to review the flow of authority since Mia.

Post - Mia decisions in this court provide ammunition for both sides in the present proceedings. The petitioners draw comfort from the application of the right to liberty clause in D & H Holdings Ltd. v. Vancouver (1985) 64 B.C.L.R. 102 (denial of a business licence) and Stoffman v. Vancouver General Hospital [1986] 6 W.W.R. 23 (denial of hospital admitting privileges). See also, Re Yong et al v. College of Physicians and Surgeons (January 24, 1986) Vancouver Registry No. A852805 - 6 - 7, unreported (disciplinary proceedings on charges of unprofessional conduct). Submissions based on the right to liberty clause have been rejected in other decisions without extended consideration of Mia -- Re Weinstein and Minister of Education for British Columbia (1985) 20 D.L.R. (4th) 609 (removal from office of school board members) and R. v. McLean (1986) 2 B.C.L.R. (2d) 232 (Criminal Code restrictions on certain activities related to prostitution) -- or without reference to it: Re Homemade Winecrafts (Canada) Ltd. and Attorney General for British Columbia (1986) 26 D.L.R. (4th) 468 (prohibition on marketing or promotion of "Wonder Wine") and Noyes v. Board of School Trustees (1985) 64 B.C.L.R. 287 (suspension of teacher without pay upon being charged with a criminal offence). In Homemade Winecrafts,

supra, reliance was placed (at 471) on the decision of the Court of Appeal in R. v. Robson, supra, for the proposition that any such right could properly be characterized as a purely commercial or economic right in the nature of a property right not covered by s.7 of the Charter. The respondents point out that the broad interpretation given in Mia to the right to liberty clause as embracing economic rights was vigorously disagreed with in Re Abbotsford Taxi Ltd. and Motor Carrier Commission (1985) 23 D.L.R. (4th) 365 (grant of a taxi licence to a competitor) and they submit that Mia is not readily reconciled with the conclusions drawn in Milk Board v. Clearview Dairy Farm Inc. (1986) 69 B.C.L.R. 220 (denial of a licence to sell milk) where these observations were made (at 243-44):

At varying times in his submission to me, Mr. Harvey for Clearview has alluded to Clearview's "economic rights", "freedom", "freedom to contract", "freedom to engage in a calling" and a general overall "right to work" that has been enshrined as a right under the Canadian Charter of Rights and Freedoms. With deference to those who may have come to a contrary conclusion, I do not see in the decided cases any absolute common law "right to work".

...

Whether one describes the concept as a right to work, a right to engage in a calling or a right to do business, people were attracted to emigrate to this country on the understanding that they would find opportunities to employ their skills. Today I do not believe that the concept can be placed on any higher footing than this:

Regardless of what field of endeavor may be involved, lawful residents of Canada are entitled to be afforded so far as is practicable an opportunity to utilize their capabilities in the market or work force without unjustifiable discrimination.

The reference at the end of this passage to "unjustifiable discrimination" is, of course, to the equality rights set out in s.15, a provision of the Charter which had not been proclaimed into force at the time Mia was decided. Finally, and most recently, in Beltz v. Law Society of British Columbia (November 3, 1986) Vancouver Registry No. A861300, unreported (cost of practice certificate as unreasonable restriction on right to practise profession), doubt was expressed as to whether, despite Mia, s.7 applies to economic rights at all (at 12).

A review of the cases in this court since Mia leads me to the conclusion that the latter decision cannot be taken to have settled the law respecting the applicability of the right to liberty clause to economic rights generally or the right to work in particular. Nor has my attention been drawn to any decision of the Court of Appeal or the Supreme Court of Canada which can be regarded as determinative on these issues.

Turning to recent decisions in other jurisdictions, deprivation of the right to liberty otherwise than in accordance with principles of fundamental justice has been considered in a number of decisions concerning medical practitioners. The broad interpretation given to the right to liberty clause in Mia was adopted in Branigan v. Yukon Medical Council [1986] 1 B.C.L.R. 350 (Y.T.S.C.), distinguished in Isabey v. Manitoba Health Services Commission [1986] 4 W.W.R. 310 (Man. C.A.) (leave to appeal to S.C.C. dismissed October 27, 1986), and qualified in Charboneau v. College of Physicians and Surgeons (1985) 22 D.L.R. (4th) 303 (Ont. H.C.) In each of these cases, for various reasons, the constitutional challenge based on s.7 of the Charter failed.

A number of the decisions referred to above in connection with s.6 mobility rights rejected an argument based on s.7 of the Charter. One such is R. v. Quesnel, supra, where the Ontario Court of Appeal disposed of the s.7 argument in the following terms (at 24 C.C.C. (3d) 86):

Counsel submits, notwithstanding that high authority [Skapinker], that s.7 of the Charter dealing with life, liberty and security of the person, provides a free standing right to work. Unfortunately for that argument, it has been authoritatively held in a number of cases that this section does not relate to employment: see R. v. Videoflicks Ltd. et al (1984), 48 O.R. (2d) 395 at p.433. . .

The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes.

See also Downey et al v. The Queen, a judgment of the Federal Court, Trial Division, released May 16, 1985, unreported. . .

Subsequent decisions in Ontario and other provinces, as well as in the Federal Court, are generally consistent with the above-quoted passage from Quesnel. A useful review is provided by the recent decision in Re Aluminum Co. of Canada and The Queen (1986) 55 O.R. (2d) 522 (Ont. Div. Ct.) at 529-30:

The early history of s.7 of the Charter reveals a marked reluctance on the part of the judiciary to use s.7 to protect general economic rights: see R. v. Videoflicks Ltd. et al (1984) 48 O.R. (2d) 395 at pp. 423-33 . . . (C.A.), and Gershman Produce Co. Ltd. v. Motor Transport Board (1985), 22 D.L.R. (4th) 520 at pp. 528 and 532 . . . (Man. C.A.) This judicial reluctance to find protection for economic rights in s.7 of the Charter is, no doubt, founded upon the common knowledge that the right to "property" was expressly rejected by the Joint Committee on the Patriation of the Constitution for

inclusion in the Charter, unlike its inclusion in the Canadian Bill of Rights.

The applicant, however, contends that fresh life has recently been breathed into s.7 of the Charter by the landmark judgment of the Supreme Court of Canada in Reference re section 94(2) of B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 ... and by the previous judgment of that Court in Singh et al. v. Minister of Employment & Immigration, [1985] 1 S.C.R. 177 ... The applicant, in effect, contends that s.7 of the Charter must be interpreted so that the right to liberty now encompasses the right not to be deprived of any economic right, including the right to market aluminum cans, except in accordance with the principles of fundamental justice.

The applicant's contention must be rejected. Neither of the above Supreme Court of Canada cases dealt with economic rights; they dealt with physical liberty and physical security of the person ...

In neither the Motor Vehicles Reference, nor the Singh case, does the Supreme Court of Canada expressly expand the notion of "liberty" or "security of the person" to include economic rights. In my opinion, neither should this Court distort the plain meaning of s.7. Even adopting the purposive approach to s.7 of the Charter, it is patently clear that s.7 was not intended to include economic rights. The modern fathers of Confederation expressly rejected that notion.

The conclusion that s.7 of the Charter does not safeguard economic rights is supported by the recent judgment of the Federal Court in Smith, Kline & French Laboratories Ltd. et al v. A.-G. Can (1985) 24 D.L.R. (4th) 321 at p.363 ... (F.C.T.D.) I agree with the observation made in that case by Strayer J. ... that the concepts of "life, liberty and security of the person" take on a colouration by association with each other and have to do with the bodily well-being of a natural person. As such they are not apt to describe any rights of a corporation nor are they apt to describe purely economic interests of a natural person".

Other Federal Court Trial Division judgments to the same effect as Smith, Kline and French, cited in the last paragraph of the above-quoted passage, include Re Groupe des Eleveurs, cited above in connection with s.6 mobility rights (at 322-23); Public Service Alliance of Canada v. The Queen (1984) 11 D.L.R. (4th) 337, at 368-69,

holding that the right to liberty clause does not encompass the freedom to contract; and Parkdale Hotel Ltd. v. Attorney-General of Canada (1986) 27 D.L.R. (4th) 19, at 34-35, holding that the clause does not extend to "an economic right to free exercise of commercial activity".

The decision of the Ontario Court of Appeal in R. v. Videoflicks, referred to in the above quotations from Quesnel and Re Aluminium Co., has now been reversed by the Supreme Court of Canada: [1986] S.C.C. No. 70 (December 18, 1986). However, the Supreme Court agreed with the conclusion reached in the decision appealed from insofar as the latter rejected the constitutional challenge based on s.7 of the Charter.

In summary, since the Mia decision some support can be found for the proposition that the right to liberty clause guarantees a free-standing right to work. But the mainstream of subsequent authority is to a contrary effect. Most recent decisions have declined to extend the right to liberty clause to the economic realm and indicate that the clause does not guarantee a right to engage in particular types of commercial activity, employment, or professional callings.

The other two sections of the Charter relied upon by the petitioners do provide a certain measure of protection for the right to work. Section 6 protects inter-provincial mobility in employment by precluding governmental preference for provincial residents to the disadvantage of other Canadian citizens or persons permanently resident elsewhere in Canada. And the s.15 equality rights, considered below, are available to an individual who has been discriminated against in the relevant sense in connection with employment. The immediate question is whether

the right to liberty clause in s.7 supplements (if it does not supersede) these protections by establishing a separate, independent right to work. Having regard to the Charter's legislative history, structure, and phraseology, and to the weight of recent authority, I answer that question in the negative.

Accordingly, the challenge to the impugned enactments based on s.7 of the Charter fails.

7. CHARTER, S.15: EQUALITY RIGHTS

The Charter provisions relating to this class of right read as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race; national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Subsection (2), dealing with affirmative action programs, is not directly relevant to these proceedings.

By its terms, s.15(1) does three things. First, it declares that every individual is equal before and under the law. Second, it sets out every individual's right: "the right to the equal protection and equal benefit of the law without discrimination". Third, it elaborates on the element of discrimination by providing

that the protected right is to be enjoyed "in particular" without discrimination based on any of nine listed grounds: (1) race, (2) national origin, (3) ethnic origin, (4) colour, (5) religion, (6) sex, (7) age, (8) mental disability and (9) physical disability. Like other right-defining provisions, s.15(1) must be read with s.1 of the Charter. The latter provision guarantees the right set out in s.15(1) subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The petitioners' constitutional challenge under s.15(1) centres on the "grandfathering" provisions of the impugned enactments. Those provisions are set out above (in part 3 of these reasons) and need not be re-examined in detail here. It will suffice to recall that a physician grandfathered under s.8.1(3) or (4) of the Act is entitled to a permanent geographically unrestricted practitioner number as of right. Those provisions relate to physicians who billed the Plan within statutorily defined periods in the course of practising fee-for-service medicine in the province. Regulation 17.09 grandfathers physicians employed in the province on the date specified, namely, May 30, 1985. The wording of this regulation is permissive but the Commission has routinely granted practitioner numbers to applicant physicians employed at the material time under the regulation. Physicians who, like the petitioners, have not been grandfathered must apply under s.8.1(2) of the Act for a practitioner number. If such application is granted, it may be subject to geographic restriction as well as the other types of restriction contemplated by s.8.2(1) of the Act.

The petitioners say that they, as new (i.e., non-grandfathered) practitioners have been deprived of their right "to the equal protection and equal

benefit of the law without discrimination" by being treated less favourably than established (i.e., grandfathered) practitioners. Speaking broadly, the legislation differentiates between established and new practitioners on the basis of whether or not the candidate for a practitioner number engaged in professional practice in the province during a certain time period prior to the coming into force of the 1985 amendments to the Act. For the sake of brevity, I will refer to this basis for differential treatment as "employment history". The petitioners' primary position is that legislative classification based on employment history violates the right guaranteed to them by s.15(1) and s.1 of the Charter. Before turning to that central issue, it will be convenient to deal with alternative grounds on which the petitioners invoke these provisions of the Charter.

The petitioners' second line of attack is to the effect that the impugned enactments discriminate on grounds of residence or on grounds of age and sex. In my view, these submissions do not require extended consideration. First, as to residence, it has been pointed out (in part 5 of these reasons) that regulation 17.08 expressly prohibits the Commission from considering the residence or former residence of an applicant in making its decision. Should the Commission disregard that clear instruction, the remedy lies in administrative, as opposed to constitutional, law. The petitioners suggest as well that discrimination based on residence arises from the fact that most new practitioners come from outside the province. Implicit in this submission is the proposition that the legislative authority of a province to enact a measure of this nature hinges on whether the province is, at the time, a net importer or exporter of medically trained personnel. No authority was cited in support of such a proposition and, in my view, it is not defensible in principle.

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Obscenity, Censorship, and Freedom of Expression: Does the *Charter* Protect Pornography?

Michael MacDonald

Introduction

Freedom of speech has long been recognized as essential to political freedom; without it, democracy could not function. Even non-verbal, artistic expression has traditionally been valued for its symbolic commentary on political and social life. Freedom of expression is now constitutionally protected by s.2(b) of the *Canadian Charter of Rights and Freedoms*:¹

2. Everyone has the following fundamental freedoms:

...

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Unlike political and artistic expression, pornography has not traditionally been valued by society or protected by the law. Pornography expresses images and feelings of sexuality, among other things, not ideas or opinions concerning politics and society. It has been considered irrelevant to democracy and therefore denied the protection extended to the communication of ideas. Obscenity has been penalized for centuries,² and is still suppressed by both federal and provincial law in Canada.

The newly entrenched status of freedom of expression necessitates a re-examination of the traditional limits on freedom of speech, including obscenity law and censorship. Some limits will survive, as the freedoms guaranteed by the *Charter* are not absolute but are limited by s.1, which reads:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. Part I of the Constitution Act, 1982.

2. See, for example, *R. v. Curl* (1727), 93 E.R. 849 (K.B.).

It is possible that some forms of expression, such as pornography, are entirely outside the protection of s.2(b), rather than merely subject to limits under s.1, although I will argue against such an interpretation. This paper will examine the legal suppression of pornography in light of the entrenchment of freedom of expression in the *Charter*. Entrenchment requires that legal restrictions on pornography be justified under s.1 of the *Charter*, which means that the harms attributed to pornography must be demonstrated, and that censorship and obscenity laws must be articulately justified as proportionate means to the prevention of those harms. Before turning to the question of whether pornographic expression is within the scope of s.2(b), I will outline the current federal and provincial law in this area.

The suppression of pornography at the federal level is prescribed, principally, by the *Criminal Code*.³ S.159(1)(a) provides that

- (1) Every one commits an offence who
 - (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, ...

S.160 of the *Criminal Code* provides for the seizure of allegedly obscene material by warrant, and its forfeiture to the Crown upon a judicial determination of obscenity. The section is directed at the obscene matter itself; unlike s.159, it creates no *in personam* offence. The Customs Tariff Act⁴ prohibits importing materials "of an immoral or indecent character," which is interpreted by Customs officials to mean "obscene" within the *Criminal Code* definition.⁵

S.159(3) of the *Code* provides a defence to a charge under subs. (1) if the public good was served by the acts in question. Exhibition of an anti-pornography documentary film such as the National Film Board production "Not a Love Story," for example, might fall within the exception of subs. 159(3). Where no such defence is established, it may be presumed that the material did not serve the public good, and this may be a relevant consideration in the balancing of interests required under s.1 of the *Charter*. If the material serves no public good, there may be nothing in the scales to weigh against the public interest in suppressing pornography.

Obscenity is defined by subs. 159(8) of the *Code*:

- (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

3. (1970), R.S.C. c.C-34.

4. (1970), R.S.C. c.C-41.

5. *Id.*, s.14, and Schedule C, item 99201-1; on its application see *Obscenity: A Study Paper*, by Richard G. Fox, for the Prohibited and Regulated Conduct Project of the Law Reform Commission of Canada, Appendix B, 130 (Ottawa, 1972).

"Any publication" includes films and videotapes⁶ as well as books and magazines. The heart of the definition lies in the judicial interpretation of "the undue exploitation of sex." Whether a dominant characteristic of a publication is the undue exploitation of sex depends primarily upon whether the work as a whole exceeds the standards of tolerance of the contemporary Canadian community.⁷ The standards to be determined are those of a hypothetical cross-country average.⁸ In practice, pornography may be found obscene if it includes visually explicit depictions of sex, or depictions of sex and perversions or extreme violence. Whether any particular material exceeds the limits of community tolerance is often a difficult question, to be decided according to the individual fact case.

Pornography is controlled by provincial legislation as well as by criminal law. The Ontario Theatres Act⁹ is a typical example of such legislation, and it is currently under consideration by the Supreme Court in *Ontario Film and Video Appreciation Society v. Board of Censors*.¹⁰ The Act creates a Film Review Board with authority to review, classify, and censor every film or videotape distributed or publicly shown in Ontario. This applies even to films or videos sold or rented for private viewing in private homes. The Board can demand that scenes be cut from a film or video before it is approved for distribution or exhibition, or it can prohibit the film's distribution altogether. The Ontario Film and Video Appreciation Society has challenged the validity of the Board's powers under s.2(b) of the *Charter*. In *Ontario Film and Video*¹¹ both the Divisional Court and the Court of Appeal agreed that film censorship is, *prima facie*, a denial of freedom of expression, though possibly justifiable under s.1 of the *Charter*. The actual decision in that case, currently on appeal to the Supreme Court, was that because the power granted by the Theatres Act was unlimited by any legal criteria, the infringement of freedom of expression was not "prescribed by law" as required by s.1 of the *Charter*.¹² Therefore the substantive issues of censorship and freedom of expression did not have to be decided, and presumably will not be fully addressed by the Supreme Court in that case. The decision in *Ontario Film and Video* is now moot, as the Ontario government has established legal guidelines for the Film Review Board, by regulation made under the Theatres Act.¹³ The regulatory guidelines and provincial censorship in general will be considered again below in the discussion of s.1 of the *Charter*.

Whether provincial censorship legislation and the criminal law of obscenity

6. *R. v. Times Square Cinema Ltd.* (1971), 4 C.C.C. (2d) 229 (Ont.C.A.); *R. v. Odeon Morton Theatres Ltd.* (1974), 16 C.C.C. (2d) 185 (Man.C.A.).

7. *R. v. Brodie et al.*, [1962] S.C.R. 681; *r. v. Times Square*, *supra*, note 6; *R. v. Dominion News and Gifts Ltd.*, [1964] S.C.R. 251; *R. v. Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man.C.A.); *R. v. Popert et al.* (1981), 58 C.C.C. (2d) 505 (Ont.C.A.).

8. *R. v. Dominion News*, *supra*, note 7; *R. v. Cameron*, [1966] 4 C.C.C. 273.

9. R.S.O. 1980, c.498.

10. *Ontario Film and Video* (1983), 5 C.R.R. 373 (Ont.H.C.J.); *affd.* (1984), 7 C.R.R. 129 (Ont.C.A.).

11. *Id.*

12. *Id.*

13. Amendment to Reg. no. 931 of R.R.O. 1980, under the Theatres Act, released 4 Feb. 1985.

justifiably limit freedom of expression depends on two major issues. The first concerns the forms of expression that fall within the protective scope of s.2(b). The second concerns the particular limits on protected expression to be justified under s.1.

Is Pornography "Expression"?

Traditional Limits

Before considering whether censorship and obscenity law can be justified under s.1 as reasonable limits on freedom of expression, it must first be established that pornography is within the protection of s.2(b). Freedom of expression has always been a narrow and qualified right in Canada. The courts have often spoken of the importance of freedom of speech to the democratic process, but they were also quick to point out the limits of the freedom; as Chief Justice Duff noted in the *Alberta Press* case:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order ... In a word, freedom of discussion means ... "freedom governed by law."¹⁴

The "right of public discussion," when properly exercised, was seen as a necessary condition of democracy; in that sense, it was an instrumental right, a means to an end rather than an end in itself. This view overlooks the value of expression as an end in itself, an aspect of individual freedom, dignity and self-fulfillment. The scope of s.2(b) may depend on whether freedom of expression is seen as an instrumental value or as an end in itself. If s.2(b) is interpreted to apply only to the discussion of political and social issues, it will leave important areas of human expression unprotected. Literature, drama, music, dance, and graphic arts, for example, can serve emotive and introspective functions without any apparent communication of socially or politically significant ideas. A view of freedom of expression as a mere means to political freedom might leave such expression unprotected.

A major restriction of the scope of freedom of speech before the *Charter* was that it applied specifically to "speech" rather than to expression in general. In *Attorney General of Canada v. Dupond* (1978)¹⁵ the Supreme Court held that a right of peaceful demonstration in the streets was not guaranteed by the protection of free speech and assembly in the Canadian Bill of Rights.¹⁶ Justice Beetz said for the majority:

Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than that of an appeal of reason; their inarticulateness

14. [1938] S.C.R. 100, 133.

15. [1978] 2 S.C.R. 770.

16. R.S.C. 1970, App. III, s.1(d) and (e).

prevents them from becoming part of language and from reaching the level of discourse.¹⁷

The *Charter* protects freedom of "expression", which seems to be wider than "speech." But s.2(b) could be read narrowly as an instrumental right, confined to political or socially useful expression, or as a "freedom governed by law," with all the traditional limitations imposed by the laws of sedition, contempt of court, libel, and obscenity.

Freedom of Expression in the United States

The scope of freedom of speech in American constitutional law will be of interest to Canadian courts in assessing freedom of expression in s.2(b). The First Amendment to the U.S. Constitution declares that "Congress shall make no law ... abridging the freedom of speech, or of the press; ..." Freedom of "speech" has been extended to non-verbal conduct with politically symbolic content,¹⁸ and to film,¹⁹ but even verbal communication has been partially excluded from the protection of the First Amendment in non-political contexts. Until recently, for example, commercial speech (advertising) was not protected.²⁰ This position has since been abandoned, although protection of commercial speech is less strict than that of other speech.²¹ Obscenity is now the only type of expression categorically excluded from First Amendment protection, although even protected speech is subject to certain limits.

The justification given for excluding some expression from constitutional protection was that "speech" was an instrumental value, necessary to the attainment of truth and democracy through the free discussion of ideas and opinions. In *Chaplinsky v. New Hampshire* (1942),²² the U.S. Supreme Court upheld a ban on insults in public places, because such "fighting words" are "no essential part of any exposition of ideas."²³ Justice Murphy, for the court, stated in *obiter dicta* that "the lewd and obscene" are also unprotected, because they are of such "slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²⁴ The exclusion of obscenity from First Amendment protection was authoritatively affirmed by the Court in *Roth v. U.S.* (1957),²⁵ in which Justice Brennan stated for the majority that "obscenity is not within the area of constitutionally protected speech," because obscenity is "utterly without redeeming social

17. *Supra*, note 15, 797.

18. "Speech" includes flag-burning: *Street v. N.Y.* (1979), 394 U.S. 576; draft-card-burning: *U.S. v. O'Brien* (1968), 391 U.S. 367; wearing black armbands: *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503.

19. *Freedman v. Maryland* (1965), 380 U.S. 51.

20. *Valentine v. Christensen* (1942), 316 U.S. 52.

21. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), 425 U.S. 748; *Bates v. State Bar of Arizona* (1977), 433 U.S. 350.

22. 315 U.S. 568.

23. *Id.*, 571 - 2, *per* Murphy, J.

24. *Id.*

25. 354 U.S. 476.

importance."²⁶ The Supreme Court has established the extent of the obscenity exception in a definition similar to the Canadian definition of obscenity, though somewhat narrower.²⁷ This will be discussed in the context of s.1, below.

However, while obscenity is not protected by the First Amendment, the protection accorded to other forms of speech is strong. Limitations on freedom of speech can be justified only to meet a "clear and present danger"²⁸ or a "compelling state interest."²⁹ Such limitations must not be substantially wider than necessary to achieve the state purpose, or the law may be invalid by reason of "overbreadth."³⁰

Section 2(b) of the Charter

When the Supreme Court of Canada eventually considers the place of obscenity in constitutional law,³¹ the American position may suggest that obscenity should, similarly, be excluded from s.2(b) of the *Charter*. It is submitted that such a result would be unjustified. The U.S. First Amendment differs fundamentally from s.2 of the *Charter* in that the U.S. Bill of Rights is expressed in absolute terms, without any express limitations. Therefore the U.S. courts were compelled to find *implicit* limits to constitutional rights, including freedom of speech. But the *Canadian Charter of Rights* has *expressly* provided for limits on constitutional rights in s.1. S.1 provides for a flexible approach, which makes the American dichotomy between strict protection in some cases and complete exclusion in others inappropriate.

The rights and freedoms set out in the *Charter* are "subject only" to the limits allowed by s.1. Finding implicit limits in addition to the limits expressly allowed is not only unnecessary (by virtue of s.1), but also a clear contradiction of the *Charter's* declaration that s.1 contains the "only" limits on *Charter* rights. Of course, some of the rights are internally qualified, as, for example, in s.8's reference to "unreasonable" search or seizure. But the internal qualification of *some* rights only strengthens the view that *unqualified* rights, such as freedom of expression, are absolute, subject only to s.1. Paul Bender of the University of Pennsylvania Law School suggests, on this basis, that even obscenity should be included in the scope of s.2(b).³²

26. *Id.*, 484 - 5.

27. *Miller v. California* (1973), 413 U.S. 15. The *Miller* test for obscenity, *per* Burger, C.J., for the majority, 24, is: "(a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

28. *Schenk v. U.S.* (1919), 249 U.S. 47; *Bridges v. California* (1941), 314 U.S. 252.

29. Laurence Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press Inc., 1978), 602.

30. See Tribe, *op. cit.*, chapter 12, and *Thomhill v. Alabama*, 310 U.S. 88, 97.

31. At the time of writing, no obscenity case under the *Charter* has been decided by any provincial Court of Appeal.

32. Paul Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms" (1983), 13 *Man.L.J.* 669, 679 - 80; Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983), 28 *McGill L.J.* 811, 862.

The question of the inclusion of pornography in s.2(b) was raised in the hearings of the Special Joint Committee of Parliament on the draft *Charter*:

Mr. Hawkes: I just have a question for the Minister and for his legal advisors. Are there any implications for the issue of *hate literature or pornography* [in the wording of s.2(b)]? ... Does this restrict governments anymore in terms of dealing with those kinds of social issues or not?

Mr. Kaplan: No, our view is that the hate literature legislation would be justified *within the qualification contained in Clause 1* for reasonable limits. (emphasis added)³³

Presumably what Mr. Kaplan said of hate literature also applied to pornography, as Mr. Hawkes' question raised both concerns.

Finally, it should be noted that freedom of expression is identified by the heading to s.2 as a "Fundamental Freedom," not just a "Democratic Right" as in ss.3 to 5. This may indicate that freedom of expression is a fundamental value in itself, not just a means to a democratic society.

Cases under the Charter

The meaning of "expression" in s.2(b) has been considered in several cases, although the place of obscenity has not yet been decided by any appellate court. The Ontario Divisional Court, in *Re Koumoudouros and Municipality of Metropolitan Toronto* (1984),³⁴ considered an "exotic dancer's" claim to freedom of expression after she asserted a constitutional right to dance without any covering of her pubic area (as required by a Toronto by-law). The case is now before the Ontario Court of Appeal. Justice Eberle, for the Divisional Court, thought that s.2(b) included only *political* freedoms, and probably did not include even artistic expression.³⁵ He also seems to suggest that a profit motive may exclude the protection of s.2(b):

... the conclusion from the evidence is clear that the right claimed in these cases is not a right to freedom of artistic expression but the right to expose performers' pubic areas *for the purpose of stimulating liquor sales*. I find it difficult to accept that the framers of the Charter had any such right in mind ...³⁶

Assuming that the framers of the *Charter* indeed had no such right in mind, they could well have assumed that s.1 would apply in such cases. Commercial motives cannot nullify the protection of the *Charter*. A newspaper or book is generally written and published to make profit for the publisher and earn royalties or a salary for the author, but these actions must be protected. As long as we live in a capitalist society, innumerable exercises of fundamental freedoms will have a

33. Special Joint Committee on the Constitution of Canada, *Proceedings*, 32d Parliament, 1st Session, 43 - 64 (22/1/81).

34. 8 C.R.R. 179 (Ont.H.C.J.).

35. *Id.*, 188-9.

36. *Id.*, 189.

commercial aspect. As the Divisional Court noted in *Ontario film and Video, per curiam*,

the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong with making a profit from one's art or one's ideas.³⁷

The traditional limits of free speech were read into s.2(b) in *R. v. Keegstra* (1984),³⁸ the case of an Alberta school teacher charged with spreading anti-Semitic propaganda to his students, contrary to the hate propaganda provisions of the *Criminal Code*. Justice Quigley applied pre-*Charter dicta* on the traditional restrictions on public discussion to exclude racist propaganda from the meaning of "expression" in s.2(b). While the suppression of racist propaganda may be justifiable, it is a particularly artificial construction of the word to hold that such speech is not "expression" because of its message.

Reliance on s.2(b) failed in another "expression" case, *Source Perrier (Société Anonyme) v. Fira-Less Marketing Co. Ltd.* (1983).³⁹ The defendant adopted the Perrier bottled water company's trademark to an unsophisticated political spoof - "Perrier" became "Pierre, eh," a reference to then Prime Minister Pierre Trudeau. Justice Dube of the Federal Court granted the injunction sought by the plaintiff, finding that freedom of expression under s.2(b) was not in issue, saying:⁴⁰ "In my view, the most liberal interpretation of 'freedom of expression' does not embrace the freedom to depreciate the goodwill of registered trademarks ..." This decision may not be inconsistent with a wide reading of the word "expression," since it is arguable that the defendant's infringement of trademark added nothing to the content of the message; the legal restriction could be seen as regulation only of the form, not the content, of expression. The distinction of form from content is, admittedly, a difficult one, but explicit sexuality and other aspects of pornography are more the content of obscene expression than mere forms for the expression of something else.

The weight of authority is now clearly against the restrictive interpretations of s.2(b) given in *Koumoudouros* and *Keegstra*.⁴¹ In the *Ontario Film and Video* case the Ontario Court of Appeal rejected the censor board's submission that "expression" is qualified by the traditional restraints on freedom of speech, such as film censorship.⁴² The Divisional Court in that case, affirmed by the Court of Appeal, found provision for limits on freedom of expression only in ss.1 and 33 (the legislative over-ride section) of the *Charter*. The court took a wide view of "expression", stating:⁴³

37. *Supra*, note 10, 381.

38. Unreported, pre-trial motion, 5/11/84 (Alta.Q.B.).

39. 4 C.R.R. 317 (F.C.,T.D.).

40. *Id.*, 322.

41. *Supra*, notes 34 and 38.

42. *Supra*, note 10, 130.

43. *Id.*, 380.

It is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the *Charter*.

Justice Thorson, speaking for the Ontario Court of Appeal in *Re Global Communications Ltd. and State of California* (1984),⁴⁴ said of implied limits and s.1:

In my opinion no useful purpose is served in this case by exploring whether or not "freedom of the press" ought to be given a meaning that recognizes the limitations which the law has previously placed on that freedom ... As I see it, therefore, the one issue on which the outcome of this appeal must turn is whether /the law under consideration/ constitutes a reasonable limit, within the meaning of s.1 of the *Charter* ...⁴⁵

In considering whether implicit limits could be read into s.12 of the *Charter*, Justice MacDonald of the Alberta Court of Queen's Bench said, in *Soenen v. Director of Edmonton Remand Centre* (1984):⁴⁶

The rights and freedoms guaranteed by the *Charter* must, before any application of the limiting part of s.1, be interpreted in an absolute sense that does not involve the application of any judicially-created criterion ... If it were otherwise, ... s.1 would be redundant.⁴⁷

Similarly, with regard to s.11(d) of the *Charter* (presumption of innocence), Justice Stevenson, for the majority of the Alberta Court of Appeal in *R. v. Stanger* (1983),⁴⁸ declined to read limits into s.11(d), instead holding that limits on unqualified rights are to be found only in s.1.⁴⁹

The *European Convention on Human Rights* contains provisions similar to the *Charter's* ss.1 and 2(b), and therefore may help in interpreting the *Charter*. Article 10(1) of the Convention guarantees everyone the right to freedom of expression; Article 10(2) provides for restrictions on the freedom in language similar to the *Charter's* s.1. Article 10 was applied to the British obscenity statute in the *Handyside Case* (1976).⁵⁰ The European Court of Human Rights did not even consider excluding obscenity from the scope of freedom of expression, but instead found the law justified under the equivalent of s.1 of the *Charter* (Art.10(2) of the Convention).

The obscenity provisions of the *Criminal Code* and the Customs Tariff Act have been challenged under s.2(b) of the *Charter* in a number of lower court cases.⁵¹

44. 7 C.R.R. 22.

45. *Id.*, 34.

46. 6 C.R.R. 368.

47. *Id.*, 377.

48. 6 C.R.R. 257.

49. *Id.*, 276.

50. 19 Yearbook of the European Convention on Human Rights, 506.

51. *R. v. Red Hot Video Ltd.* (1984), 38 C.R. (3d) 275 (B.C.Co.Ct.); *Cote v. Deputy Min. National Revenue for Customs and Excise* (18/5/84), unreported, noted in *Annotated Charter*, Canada Law Book, 9.2 - 11 (Ont.Co.Ct.); *Re Luscher and Deputy Min., Revenue Canada* (1983), 149 D.L.R. (3d) 243 (B.C.Co.Ct.); *R. v. Ramsingh et al.* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.).

In each case, the judgment turned on the application of s.1; it was not questioned that obscenity is, *prima facie*, protected by s.2(b).

It seems clear that all forms of expression, whatever the medium, and whether they communicate fact, fiction, thought, or feeling, are within the scope of s.2(b), and subject to s.1.

Finally, in defining what is protected by s.2(b), it should be pointed out that freedom of expression would be almost meaningless without the corollary freedom of perception, and the freedom to transmit another's expression. The Divisional Court in *Ontario Film and Video* stated:

freedom of expression extends to those who wish to express someone else's ideas or show someone else's film. It also extends to the listener and to the viewer, whose freedom to receive communication is included in the guaranteed right.⁵²

Justice Tarnopolsky, for the Ontario Court of Appeal, also held that s.2(b) protects these corollary aspects of expression, in *R. v. Videoflicks et al.* (1984):

... freedom of expression under the *Charter* must extend to all forms of expression. I would add that this applies to all phases of expression from maker or originator through supplier, distributor, retailer, renter or exhibitor to receiver, whether as a listener or a viewer.⁵³

Assuming that s.2(b) now offers some protection to the production, distribution, and acquisition of pornography, it is clear that the suppression of pornography by provincial censorship and criminal obscenity laws is, *prima facie*, inconsistent with s.2(b). Censorship and obscenity law can be justified only within the terms of s.1 of the *Charter*.

The Effect of S. 1

The scheme of the *Charter* gives strong protection to the fundamental freedoms in s.2(b) by expressing them in unqualified terms and providing for limits only in s.1. The significance of this scheme is that the burden of persuasion under s.1 is on the party defending the legislation, once a *prima facie* infringement of a *Charter* right has been established.⁵⁴ Further, as Chief Justice Evans said in *Federal Republic of Germany v. Rauca* (1983),⁵⁵ "The standard of persuasion to be applied by the court is a high one if the limitation in issue is to be upheld as valid." Finally, there is no presumption of legislative validity once a *prima facie* breach of the *Charter* has been shown.⁵⁶

S.1 sets out a test for justifying limits on *Charter* rights; each element of this test must be applied to the law of obscenity and censorship before the suppres-

52. *Supra*, note 10, 381.

53. 9 C.R.R. 193, 227.

54. *Hunter et al. v. Southam Inc.* (1984), 9 C.R.R. 355, 374 (S.C.C.).

55. 38 O.R. (2d) 705, 716 (Ont.H.C.J.).

56. *Supra*, note 10, 131; *R. v. Southam* (1983), 6 C.R.R. 1, 13 (Ont.C.A.).

sion of pornography can truly be said to be justified under the *Charter*. The following sections discuss each part of the test as it applies to pornography and the law.

Prescribed by Law

Limits on constitutional rights, to be valid, must be prescribed by law. This is usually the easiest determination to be made under s.1, but the "community standards" test of obscenity law and the regulatory criteria established under the Ontario Theatres Act may present problems. While statutory law, regulations, and common law rules may all qualify as "law,"⁵⁷ to satisfy s.1 they must also be sufficiently precise. As the Divisional Court stated in *Ontario Film and Video*:

It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.⁵⁸

On that basis, the court held the unlimited discretion of the Ontario Censor Board to be unjustifiable under s.1. The Ontario Court of Appeal agreed,⁵⁹ and the Supreme Court of Canada will probably also affirm the decision. The European Court of Human Rights discussed the English law of contempt of court in similar terms in *The Sunday Times v. The United Kingdom* (1979).⁶⁰ In that case the *Sunday Times* newspaper challenged the law of contempt of court on the basis of the European Convention's guarantee of freedom of expression. That guarantee allows such limits on freedom of expression as are, *inter alia*, "prescribed by law" (Art.10(2)). The court said:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁶¹

In the result, the English law of contempt was held to be "prescribed by law." The Canadian law of obscenity, and the regulatory criteria established for the

57. *Supra*, note 10, 382.

58. *Id.*, 382 - 3.

59. *Supra*, note 10.

60. 2 E.H.R.R. 245.

61. *Id.*, 271.

Ontario Censor Board, may have to be assessed by the same criteria applied in the *Sunday Times* case.

The U.S. Constitution also requires precision in law, by the "due process" guarantee of the Fifth and Fourteenth Amendments. Due process requires fair notice to citizens of what is prohibited, and restraint of arbitrary official discretion in laying charges. Thus a law must not be so vague that those "of common intelligence must necessarily guess at its meaning and differ as to its application."⁶² An imprecise law may, in some cases, be void for vagueness. But before a court will strike down a law for vagueness, it must find that the law *could* have been drafted more precisely.⁶³ In the area of obscenity, an imprecise law may have a "chilling effect" on protected expression, since police and citizens may apply the law too widely. As particular care is, therefore, required in defining obscenity, the U.S. Supreme Court, in *Miller v. California* (1973), developed a definition which limits what the individual states may prohibit.⁶⁴

Chief Justice Burger, for the majority, outlined a test substantially similar to the Canadian test for obscenity, but with the additional statement:

We acknowledge ... the inherent dangers of undertaking to regulate any form of expression. ... As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be *specifically defined* by the applicable state law ... (emphasis added)⁶⁵

The Canadian community standards test for obscenity does not specify what is prohibited; the test remains abstract until the trier of fact makes its decision in the particular case. While the law can be conceptually understood, it is not always ascertainable in practice. Inconsistent verdicts are one result of this uncertainty. For example, three films found not obscene by Borins, Co. Ct. J., in *R. v. Rankine et al.* (1983),⁶⁶ were declared obscene by an Ontario jury less than a year later.⁶⁷ One of those same films was again brought before Borins, J. and acquitted a few months after the jury verdict.⁶⁸ In another recent case, not tried at the time of writing, *Penthouse* magazine has been charged under s.159 of the *Criminal Code* with publishing photographs which appear less offensive than other legally available material; they were published earlier the same year without legal problems in *Photo* magazine, a non-pornographic photography magazine.⁶⁹ In the *Rankine* case, Judge Borins noted:

it is impossible to define with any precision where the line is to be drawn. To do so would be to attempt to define what may be indefinable.⁷⁰

62. *Connally v. General Construction Co.* (1926), 269 U.S. 385, 391, *per Sutherland, J.*

63. *Tribe, op. cit.*, 719.

64. *Supra*, note 27.

65. *Id.*, 23 - 4.

66. 36 C.R. (3d) 154 (Ont.Co.Ct.).

67. *R. v. Film Factory Ltd.* (31/8/84), unreported (Ont.Gen.Sessions).

68. *R. v. Nicols* (1984), unreported, noted in O.L.W. vol.4 no.6, 7/12/84, 1.

69. *Penthouse*, Dec. 1984; *Photo*, May 1984.

70. *Supra*, note 66, 173.

Canadian obscenity law has been challenged in several cases under the *Charter*. In *R. v. Red Hot Video Ltd.* (1983),⁷¹ Collins, Prov. Ct. J., acknowledged the element of uncertainty in the definition of obscenity, but added, "it does not, in my view, result from a lack of clarity in the law."⁷² The appeal by the accused was on the ground that the definition of obscenity was vague, broad and uncertain, and therefore not a "reasonable limit" on freedom of expression; this is substantially the same issue raised by the "prescribed by law" requirement. Melvin, Co. Ct. J., dismissed the appeal, saying:

I am of the view in the case at bar that the legislation is not vague, broad and unreasonable ... An evidentiary difficulty is created by the Canadian tolerance component in determining whether or not the dominant characteristic of a publication is the undue exploitation of sex. In my opinion, the very nature of the subject matter covered by s.159 results in some recognition of the fluidity in the standards in existence in Canada from time to time. Recognition of the existence of change does not result in legislation that is vague, uncertain or unreasonable.⁷³

That case is now before the B.C. Court of Appeal. The issue of limits "prescribed by law" was also raised in *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise* (1983),⁷⁴ when the authority of Customs officers to prohibit entry into Canada of obscene material was challenged under s.2(b). Anderson, Co. Ct. J., rejected the argument that the community standards test of obscenity was too vague. Stating that obscenity "can only find definition in the broad and ever-changing concept of the community standard of tolerance," Judge Anderson compared that test to other imprecise terms in law, such as "reasonable" and "dangerous." He concluded that the definition of obscenity satisfies s.1 of the *Charter*.⁷⁵ *Luscher* is now before the Federal Court of Appeal. The Ontario County Court reached a similar conclusion in another importation case, *Côté v. Deputy Minister of National Revenue for Customs and Excise* (1984),⁷⁶ when McWilliam, Co. Ct. J., held that the definition of obscenity, though difficult to apply, may be given meaning in light of shifting community standards. Again, in *R. v. Ramsingh et al.* (1984),⁷⁷ Ferg, J., of the Alberta Court of Queen's Bench considered this issue and stated:

Difficult as it may be to apply the elusive standard, nevertheless, I am of the view that the legitimate legal rules are accessible, are precise enough to be determinable by the well-intentioned citizen, and are couched in terms which do afford proper application.⁷⁸

71. 6 C.C.C. (3d) 331.

72. *Id.*, 191.

73. 38 C.R. (3d) 275, 281 - 82 (B.C.Co.Ct.).

74. *Supra*, note 51.

75. *Luscher*, *supra*, note 51, 250 - 2.

76. *Supra*, note 51.

77. *Id.*

78. *Ramsingh*, *supra*, note 51, 246.

The view of Canadian courts on this issue seems to depend on the conceptual certainty of the community standards test, which has been clearly formulated in obscenity law, while admitting that the test in practice is "fluid," "ever-changing," "shifting," and "difficult to apply." It is just this fluidity and difficulty of application which leads to inconsistent verdicts and prejudice to those citizens who stray unwittingly over the boundaries of tolerance. The safe course of action for the "well-intentioned citizen" is to stay well clear of material anywhere near the limits of the law. Thus uncertainty causes what American courts call the "chilling effect," whereby even constitutionally protected expression is inhibited by the uncertain extent of criminal expression.

The potential chilling effect and the prejudice to those who unintentionally exceed the community standards of tolerance are, it is submitted, the sorts of harm s.1 aims at in requiring that limits on freedom of expression be prescribed by law. Some imprecision in law is inevitable, as with the concept of "reasonableness," but at least the abstract precision of "reasonableness" does not incorporate a constantly changing factual variable, as "obscenity" does. Vagueness is not unavoidable; the Supreme Court of Canada could reformulate the Canadian law with more precision, or compel Parliament to do so by striking down the existing s.159(8) definition. Borins, Co. Ct. J., in *R. v. Nicols* (1984),⁷⁹ because of the vagueness of the law in this area, suggested "that the time may have come when the appellate courts may wish to reconsider the interpretation of s.159(8)."⁸⁰

Judge Borins in *Nicols* also suggested that *in rem* proceedings under s.160 of the *Code* be used to "avoid inflicting a criminal record on one convicted ... in circumstances where he cannot be expected to know that he has committed an offence."⁸¹ The same solution to problematic vagueness was suggested by Justice Douglas in the U.S. Supreme Court, in dissent, in *Miller v. California* (1973).⁸²

Provincial censorship legislation must also be prescribed by law. The legislation declared invalid in *Ontario Film and Video* could, according to the Divisional Court, "be rendered operable by the passage of regulations ... imposing reasonable limits and standards."⁸³ The Ontario Government has now amended the regulation under the Theatres Act to impose limits on the censor board's discretion;⁸⁴ its validity will presumably be challenged in the near future. The specificity of the Ontario regulation may suggest possibilities for criminal obscenity law as well. According to the regulation, the Ontario Film Review (and censorship) Board may refuse to permit scenes of graphic or prolonged violence, crime, horror, degradation, and humiliation, among other things. Sexual content is limited by, in addition to the criteria above, the possible prohibition of "the explicit depiction of sexual activity"; and "undue emphasis on human genital organs." Sexual activity is defined as follows:

79. *Supra*, note 68.

80. *Id.*

81. *Id.*, 15.

82. *Supra*, note 27, 41.

83. *Supra*, note 10, 383.

84. *Supra*, note 13.

In this section, "sexual activity" means acts, whether real or simulated, of intercourse or masturbation, and includes the depiction of genital, anal or oral-genital connection between human beings and animals, and anal or genital connection between human beings by means of objects.

While such precision may not cover all cases in which censorship might (if ever) be desirable, it should be substantially adequate, while avoiding the vagueness of obscenity law. Although "undue emphasis" on genital organs may be imprecise, the criteria are, on the whole, quite specific and can be expected to meet the requirement that they be "prescribed by law." A similarly specific municipal by-law aimed at "sex-oriented products" was upheld by the B.C. Supreme Court in *Red Hot Video v. Vancouver* (1983).⁸⁵ One possible problem with the new regulation is the provision that "the Board *may* refuse" to approve the scenes mentioned above (emphasis added). The power is still discretionary, though limited; the criteria could be applied selectively or inconsistently, according to the whim of an official.

Whether censorship and obscenity provisions are sufficiently precise to give fair notice of what is prohibited is relevant not only to whether they are "prescribed by law" but also to whether the limits they impose are "reasonable." This issue was raised in the *Luscher*⁸⁶ and *R. v. Red Hot Video*⁸⁷ cases discussed above. The defence in those cases argued, unsuccessfully, that the definition of obscenity or indecency was too vague to be "reasonable."

Reasonable Limits, Justifiable in a Free and Democratic Society

Restrictions on pornography, to be justified under s.1, must not only be prescribed by law and not unreasonably vague, they must also be proportionate means to achieving a rational state purpose.⁸⁸ There can be no determination of proportionality between ends and means without an identification of the rational state purpose relied on. As MacKinnon, A.C.J.O., said for the Ontario Court of Appeal in *R. v. Southam* (1983):

In determining the reasonableness of the limit in each particular case, *the court must examine objectively its argued rational basis* in light of what the court understands to be reasonable in a free and democratic society. (emphasis added.)⁸⁹

As Quigley, J., put it in *Keegstra*, "The hurt or harm that is caused by the evil ... must ... be examined as part of the rationality for the legislation."⁹⁰

If the justification of censorship and obscenity law is to be properly articulated, it must begin by identifying the harms addressed by the suppression of pornog-

85. 48 B.C.L.R. 381.

86. *Supra*, note 51.

87. *Id.*

88. See J. Debono, "Section 1: A Guarantee of Liberty" (unpublished, University of Toronto, 1985).

89. *Supra*, note 56.

90. *Supra*, note 38, 29.

raphy. It has never before been the duty of our courts to identify the purposes of a law, except to resolve ambiguities, but this is now a necessary condition of the assessment of proportionality (and hence, reasonableness) under s.1. It cannot be sufficient to say that the purpose of obscenity law is the suppression of obscenity; that is merely circular and allows no meaningful inquiry into proportionality.

Once the alleged harms caused by pornography are identified, proportionality requires that the legal response is not substantially wider than necessary to suppress those harms. If there is a less drastic means to the same end, the more severe limitation may be unreasonable. This reasoning was used by the Ontario Court of Appeal in *R. v. Southam* (1983)⁹¹ to declare a section of the old Juvenile Delinquents Act invalid under the *Charter*. The section prescribed the exclusion of the public from all trials of alleged juvenile delinquents; MacKinnon, A.C.J.O., for the court, said:⁹² "The net which s.12(1) casts is too wide for the purpose which it serves. Society loses more than it protects by the all-embracing nature of the section." Proportionality is required of limitations on freedom of speech in American law by the "overbreadth" doctrine.⁹³ In *Butler v. Michigan* (1957),⁹⁴ for example, the sale to an adult of a book which might corrupt a child was held an invalid infringement of free speech, because the restriction was unnecessarily wide for its purpose.

Whether the Canadian law of obscenity and provincial censorship legislation are overbroad and therefore not "reasonable limits" under s.1 will depend on what harms are addressed by the suppression of pornography. A discussion of some of the harms attributed to pornography follows.

The historical basis for obscenity law is the protection of public morals; s.159 of the *Criminal Code* follows the heading "Offences Tending to Corrupt Morals." The guarantee of freedom of expression in the European Convention is subject, by Art.10(2), to such restrictions as are necessary for, *inter alia*, "the protection of health or morals", and this may suggest that a similar basis for restrictions can be read into s.1 of the *Charter*. But whether the enforcement of morality is today a legitimate basis for criminal law is doubtful. Lord Patrick Devlin and H.L.A. Hart have debated the point in print, defending respectively the "moral" and "harm" criteria for criminal sanctions.⁹⁵ The Canadian government has taken the latter position, endorsing the threat of serious harm as the only proper basis for criminal law.⁹⁶ As well as being a dubious basis for criminal law, sexual morality is a controversial subject, lacking a clear consensus, so that the protection of morals is probably not a rational state purpose sufficient to justify severe restrictions on freedom of expression. The guarantee of freedom of thought, belief, and opinion in s.2(b) reinforces the idea that there can be no legitimate enforcement of morality in the absence of a threat of serious harm.

91. *Supra*, note 56.

92. *Southam*, *supra*, note 56, 22.

93. *Supra*, note 30.

94. (1957), 352 U.S. 380.

95. H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

96. *The Criminal Law in Canadian Society* (Ottawa: Department of Justice, 1982), 52 - 3.

The most obvious harm of pornography is its offensiveness to most people when openly displayed; people are upset, insulted, or disgusted by the sight of blatant sexual images, or images of sexual violence or degradation. Publicly displayed pornography is thus a form of public nuisance, the suppression of which is a rational state goal. The community standards test of obscenity is well suited to measure pornography's offensiveness to the public at large. But the current laws, which govern private viewing and distribution as well as public display, are disproportionate means to the prevention of public offence. Censorship can effectively spare movie audiences from offensive scenes in films, but saving audiences from being offended or disgusted does not require censorship. Film classification, where all films are reviewed and labelled to forewarn audiences, is adequate to prevent people from being offended against their will, without simultaneously denying freedom of choice to others. When a scene is censored, members of the public never see it, and have no opportunity to decide whether or not they would be offended. With classification available to adequately respond to offensive pornography, outright censorship and criminal penalties for private viewing must be recognized as disproportionate solutions to pornography as a public nuisance.

Perhaps the most serious effect attributed to pornography is the incitement of some pre-disposed individuals to anti-social behaviour, ranging from oppressive relations with women to rape and murder. Narrowly defined limits on freedom of expression could be justified by the need to protect individual physical safety. But before an incitement effect can justify censorship and obscenity law, s.1 requires that the effect be demonstrated; this aspect of s.1 will be considered more fully later. Then there is the question, essentially political, of how much violence is sufficiently serious to justify the complete suppression of explicit pornography. For example, if it is shown that pornography has a role in inciting some individuals to rape, the court must still weigh political values, because social interests in preventing harm must be weighed against the rights of pornographers and their customers. To draw an analogy, alcohol is involved in many rapes, but, like other harmful influences, it is legal because the rights of those who do not abuse alcohol outweigh the harm attributable to its abuse by some. To restrict the rights of all because of the actions of a few may be disproportionate and unreasonable.

Pornography is also often held partly responsible for an increase in the general level of violence in society, aside from any direct incitement effect. Continued exposure to pornographic violence is said to desensitize the viewer to real violence against women, leading to gradually increasing tolerance to crimes of sexual assault. Again, whether the risk of desensitization to violence justifies suppressing pornography depends on whether such an effect can be demonstrated, and if so, whether the magnitude of the effect sufficiently outweighs the competing interests of other individuals.

The most recent characterization of pornography is that it is a form of "hate literature" against women. As such, it is considered intolerable in a humane and liberal society. Susan Brownmiller, a feminist author, expresses this viewpoint:

Pornography functions quite similarly to anti-Semitic or racist propaganda. The intent ... is to distort the image of a group or class of people, to deny their humanity, to make them such objects of ridicule and humiliation that acts of aggression against them are viewed less seriously. Also, the aggression is subliminally encouraged by the propaganda itself. In an age when women are putting forward their aspirations toward equality ... pornography is working to increase hostility toward women ...⁹⁷

If pornography increases the level of actual violence against women, then there is a rational state purpose, consistent with a free and democratic society, in its suppression. But if the problem is simply one of attitudes toward women, the justification for censorship and obscenity law is less clear. The freedom to promote attitudes, even bad attitudes, is a personal one which would be dangerous to restrict. In a free society, even "hate propaganda" such as pornography should be allowed to compete with the promotion of more positive images and attitudes, because the competition furthers awareness and discussion of important issues. Errors are more likely to be exposed as such in public discussion than through suppression. The right to promote even "wrong" beliefs is strictly protected by U.S. courts; in *Village of Skokie v. National Socialist Party* (1977),⁹⁸ for example, the right of American Nazis to demonstrate in public was affirmed by the court, on the basis that the governmental restriction of expression would be a greater danger to freedom than the expression itself. Whether the suppression of anti-social attitudes expressed in pornography is a justifiable limit on freedom of expression, and possibly also on the freedoms of thought, belief, and opinion, is basically a political question. It is submitted that the fostering of healthy attitudes through the suppression of any form of expression, even pornography, is too heavy-handed to be reasonable in a free and democratic society. However, that question is ultimately one for the courts and for Parliament.

There are, of course, other arguments to be made against pornography; it is not my purpose to assess all of them. The foregoing examples simply illustrate the factual and political issues affecting the determination of proportionality and reasonableness under s.1.

Since proportionality depends partly on the relative weight assigned to competing values, it must depend partly on the value assigned to freedom of expression. This may vary according to circumstances. While I have argued that even pornography is a form of "expression" under the *Charter*, that is not to say that it is as important as political expression. Pornography will presumably weigh less heavily than political speech in the assessment of proportionality under s.1, just as advertising in the U.S. and Europe is protected less strictly than other forms of protected speech.⁹⁹ But even if pornography is protected less

97. "The Place of Pornography", *Harpers*, Nov. 1984, 34.

98. (1977), 366 N.E. (2d) 347 (Ill.App.Ct.).

99. For U.S. law, see note 21, *supra*; for Europe, see *Pastor X and the Church of Scientology v. Sweden* (1979), 22 Yearbook of the European Convention 244.

strictly than other expression, s.1 nonetheless requires that it not be legally prohibited unless its value is outweighed by some competing social interest, and unless prohibition is necessary to pursue that interest.

Finally, in determining what is a reasonable limit under s.1, there are additional factors involved in assessing provincial censorship law. Censorship is a form of prior restraint on expression, as material must be submitted for approval before it is ever shown. While a citizen is free to distribute potentially obscene material and take the chance that it will subsequently be found obscene, the Theatres Act requires that all films be approved by the board before exhibition, whatever their content. The intrusiveness of this requirement may make censorship legislation harder to justify than criminal obscenity law, which at least allows freedom of action until a harmful course is taken. While the Divisional Court in *Ontario Film and Video* stated "that some prior censorship of film is demonstrably justifiable in a free and democratic society",¹⁰⁰ MacKinnon, A.C.J.O., said for the Court of Appeal, "we express no opinion on whether there can be legislated guidelines for the Board of Censors so as to be reasonable limits ... on the freedom of expression ..."¹⁰¹

A second feature of film censorship likely to detract from its reasonableness under s.1 is the fact that it discriminates against film and video expression as opposed to other media – there is no prior censorship in Canada of books, magazines, radio, television, or sound recordings. Censorship of films may be unnecessary, given that the criminal law is adequate to control the other media of communication.

The U.S. Supreme Court allows prior restraint only in "exceptional cases," because it not only "chills" but "freezes" speech.¹⁰² However, obscenity is one of the exceptional cases,¹⁰³ and censorship of obscene films is therefore permissible, provided reasonable safeguards exist to ensure censorship of only unprotected speech.¹⁰⁴

Canadian courts have not yet considered the substantive issues of prior restraint under the *Charter*; as mentioned above, *Ontario Film and Video* turned on another issue, and censorship has not been raised in other cases. There have been several cases dealing with obscenity law, and in each case the legal limits on obscenity were affirmed as "reasonable" under s.1, with little articulation of legal purpose or the balancing of interests inherent in the concept of proportionality.¹⁰⁵ For example, in *R. v. Ramsingh et al.* (1984),¹⁰⁶ Justice Ferg of the Manitoba Court of Queen's Bench said only:¹⁰⁷ "... in my opinion, for a democratic society to impose some limits on what it shall view, ... is not unreasonable." He reached

100. *Supra*, note 10, 381.

101. *Id.*, 131.

102. *Near v. Minnesota* (1931), 283 U.S. 697, 715 – 16, per Hughes, J.; see also *N.Y. Times v. U.S.* (1971), 403 U.S. 713; *Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 559; and J. Jefferson, "Loosening the Gag" (1985), 43 U.T.L. Review

103. *Near v. Minnesota*, *supra*, note 102.

104. *Times Film Corp. v. Chicago* (1961), 365 U.S. 43; *Freedman v. Maryland* (1965), 380 U.S. 51.

105. *Supra*, note 51.

106. *Id.*

107. *Ramsingh*, *id.*, 244.

this conclusion "Without examining society's motives in detail."¹⁰⁸ The B.C. Supreme Court dealt with the validity of a Vancouver City by-law that regulates, and in practice prohibits, the sale of all "sex-oriented produceds," in *Red Hot Video Ltd. v. Vancouver* (1983).¹⁰⁹ The reason given by Justice Dohm was:

... I do not think that a fair-minded person accustomed to the norms of a free and democratic society would object to the limitation imposed on the freedom of expression by the by-law. It seems to me to be a reasonable limitation. Similarly, I am of the view that the limitation is demonstrably justified in our society having in mind, again, the kind of activity at which the by-law is directed.¹¹⁰

With respect, such summary justification without articulated reasons is no longer adequate, now that freedom of expression is constitutionally protected, and subject only to such reasonable limits as can be demonstrably justified.

Finally, the closing words of s.1, the reference to "a free and democratic society," have usually been interpreted to require only a comparison of law among other acknowledged free and democratic societies.¹¹¹ With regard to pornography, although it is subject to some level of legal suppression in most countries, it must be noted that Denmark, a free and democratic society, has had no criminal obscenity law or censorship since 1969.

Demonstrably Justified

Potentially the most important restraint on censorship and obscenity law is the requirement in s.1 that limits on freedom of expression must be *demonstrably* justified. This would seem to require evidence to support the premises which justify the law in question. Demonstrable justification, then, should consist of a demonstration of the existence and magnitude of the harm addressed, to enable the court to weigh that harm against the seriousness of the restriction. Justice Evans of the Ontario High Court recognized in *Rauca* that:

"demonstrably" ... means in a way which admits of demonstration which in turn means capable of being shown or made evident or capable of being proved clearly and conclusively. ... I consider the extent of that burden to be the usual civil onus based on the balance of probabilities. Because the liberty of the subject is in issue, I am of the view that the evidence in support must be clear and unequivocal. Any lesser standard would emasculate the individual's rights now enshrined in the Constitution.¹¹²

Justice Tarnopolsky has also spoken of the desirability of evidence in applying s.1, in *R. v. Videoflicks et al.* (1984),¹¹³ where the Ontario Court of Appeal considered the validity of Sunday-closing legislation:

108. *Id.*

109. *Supra*, note 85.

110. *Id.*, 386.

111. For example, *Ontario Film and Video*, *supra*, note 10, 381, and *Southam*, *supra*, note 56.

112. *Federal Republic of Germany v. Rauca* (1982), 2 C.R.R. 131, 142 (Ont.H.C.J.).

113. 9 C.R.R. 193.

Despite the fact that this court has affirmed on several occasions ... that the onus of proof under s.1 is on the party seeking to uphold the validity of impugned legislation, counsel for the Attorney-General submitted no evidence beyond referring to the fact that Sunday was a common day of closing in such countries as the United States, the United Kingdom, Australia, New Zealand and Japan, as well as in other provinces such as British Columbia and Manitoba. She presented no other evidence, however, showing why such limitations in other jurisdictions are reasonable nor did she show how they were justified.¹¹⁴

In the few obscenity cases so far decided under the *Charter*, there has been almost no discussion of the necessary demonstration of the harms which could justify the law. Justice Dohm in *Red Hot Video v. Vancouver* (1983)¹¹⁵ took judicial notice of harm without requiring evidence:¹¹⁶

In spite of the fact that the respondent adduced no evidence to show the effect upon society of the petitioner's business if it were allowed to disseminate sex-oriented material without restriction, I think that the court is entitled to take judicial notice that there is an undesirable effect which any reasonable person would understand and object to.

Similarly, in *Keegstra*, Justice Quigley said of hate propaganda, "It does not take an expert in the field of psychology to inform the court that hate breeds hate."¹¹⁷ It is submitted that, at least with regard to pornography, the use of judicial notice is inappropriate. P.K. McWilliams, Q.C., in his text *Canadian Criminal Evidence*, quotes the following passage on the proper scope of judicial notice:

Courts will take judicial notice of what is considered by reasonable men of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible ...¹¹⁸

The effects of pornography are not so indisputable that they can properly be the subject of judicial notice. There is still no consensus among social scientists on this issue. The factual evidence is ambiguous and sometimes misleading. For example, an increase in violence both in the media and in society may suggest a causal effect of media violence, but it might also be that the media reflect rather than promote social violence. As for anecdotal accounts of criminals who have imitated scenes of violence in pornography, it should be remembered that some deranged individuals can be incited to violence by almost anything. Mass-murderer Charles Manson was inspired to kill by the Bible and the Beatles.¹¹⁹ The relevant questions are whether pornography can incite to violence *those who*

114. *Id.*, 225.

115. *Supra*, note 85.

116. *Id.*, 386.

117. *Supra*, note 38, 30.

118. P.K. McWilliams, *Canadian Criminal Evidence* (2nd ed.) (Aurora, Ont.: Canada Law Book, 1984), 638.

119. Vincent Bugliosi, *Helter Skelter* (New York: W.W. Norton, 1974).

otherwise would have remained harmless, and if so, how many people are so affected and to what extent?

Chief Justice Burger of the U.S. Supreme Court has suggested that, since we assume without proof that "good books, plays, and art" are beneficial, we can also assume that obscenity has "a corrupting and debasing impact."¹²⁰ American constitutional scholar Laurence Tribe has criticized this analogy as a basis for criminal law, pointing out that

the parallel seems fatally flawed, for the state does not and could not compel its adult citizens, on pain of imprisonment, to read Dante, watch Shakespeare, or listen to Brahms.¹²¹

U.S. courts are not constrained by a constitutional requirement of demonstrable justification in the area of obscenity law.¹²² Canadian courts are so constrained, but no longer can it be taken for granted, without evidence, that pornography actually causes most of the harms attributed to it.

Conclusion

The area [of obscenity law] is treacherously subjective. Yet all organized societies have sought in one manner or another to suppress obscenity. The right of the state to legislate to protect its moral fibre and well-being has long been recognized, with roots deep in history. (Mr. Justice Dickson, J.A., as he then was, now C.J.C., in *R. v. Great West News* (1970))¹²³

The suppression of obscenity has its roots deep in history, and deep in western culture. But tradition alone is not a rational basis for law in modern society; the *Charter* now provides a rational basis for law, at least insofar as laws infringe on the rights and freedoms guaranteed by the *Charter*. S.1 of the *Charter* requires a rational justification for limits on fundamental rights and freedoms. Because fundamental freedoms are at stake in issues which can be decided, ultimately, only by the evaluation and balancing of competing political interests, the safeguards built into s.1 are extremely important. The requirement of proportionality, for instance, implicit in "reasonable limits," must be taken seriously by the courts and invoked where necessary to limit the scope of overbroad legislation. For example, if the only demonstrable harm arising from the distribution of pornography were public offence, the current provincial and criminal laws would be disproportionate to that harm, and should be struck down or read down to be commensurate with the harm. The need for *demonstrable* justification can also be an important check on the infringement of rights; the validity of restrictions on rights and freedoms can no longer be taken for granted. Even unpopular expression, such as pornography, deserves protection if personal

120. *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 48, 63.

121. Tribe, *op. cit.*, 668.

122. *Paris Adult Theatre*, *supra*, note 120, 60 - 1.

123. 10 C.R.N.S. 42 (Man.C.A.).

liberty is to be seriously protected. Rights are of little value unless they extend even to unpopular activities. It is a crucial function of law, and especially of a *Charter of Rights*, to protect unpopular minorities from the disapproval of intolerant majorities.

Whether current restrictions on pornography are upheld or not, the reasons and methods of analysis used by the courts in reaching their conclusions will be important. The formula of s.1 for the justification of limits on constitutional rights is crucial to the protection afforded individual liberties by the Canadian Constitution. The placing of some forms of expression beyond the protection of s.2(b) would be an unfortunate narrowing of the application of s.1, which imposes the need for rational justification on all attempted limitations of fundamental freedoms.

Although s.1 provides for rational analysis, the balancing of interests required by s.1 inevitably involves political questions; rational legal analysis alone can give no "correct" answers. There can be no exclusion of political considerations from judicial analysis of *Charter* issues because the proportionality test of reasonableness of s.1 and the balance between individual freedom and collective interests inevitably depend on political judgments. Because these issues are inherently political, the public is entitled to articulate the value judgments and factual premises of judicial decisions under the *Charter*. Courts have a great deal of power under the Constitution, with s.52 allowing laws to be declared "of no force or effect." The political legitimacy of that power depends to some extent on the articulate justification of legal limits required by s.1.

I turn now to a consideration of the Charter issues.

5. CHARTER, s.6: MOBILITY RIGHTS

This section of the Charter reads:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

The right which the petitioners say is violated by the impugned enactments is that specified in s.6(2)(b), namely, the right to pursue the gaining of a livelihood in any province. For present purposes, this provision raises three questions. First, does it establish a free-standing right to work? Second, does it embrace intra-provincial (as well as inter-provincial) mobility rights? Third, do the challenged enactments infringe or deny inter-provincial mobility rights?

(a) Does s.6(2)(b) establish a free-standing constitutional right to work?

This issue is presented in starkest form by the situation of those physicians who, like the petitioners Conway and D. L. Williams, have been denied practitioner numbers. By a "free-standing" right to work I mean one which is not predicated upon or associated with an element of mobility. The leading authority is Law Society of Upper Canada v. Skapinker [1984] 1 S.C.R. 357, where it was held that a provision of the Ontario Law Society Act requiring all members of the Bar of the province to be Canadian citizens was not inconsistent with s.6(2)(b) of the Charter. Estey, J. delivering the judgment of the Court, stated (at 382-83):

I conclude, for these reasons, that para. (b) of subs.(2) of s. 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in para. (a) and in para. (b)) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence. Paragraph (b), therefore, does not avail Richardson of an independent constitutional right to work as a lawyer in the province of residence so as to override the provincial legislation, the Law Society Act, s. 28(c), through s. 52 of the Constitution Act, 1982.

The Skapinker decision, therefore, requires a negative answer to the first question. It has been referred to in a number of subsequent decisions to support the proposition that s.6(2)(b) does not create an independent constitutional right to work in the province of residence which overrides provincial legislation. These include three cases concerning marketing schemes involving quotas for producers: R. v. Quesnel (1985) 24 C.C.C. (3d) 78 (Ont. C.A.) at 86 (leave to appeal to S.C.C. dismissed May 22, 1986); Milk Board v. Clearview Dairy Farming Inc. (1986) 69 B.C.L.R. 220 (S.C.) at 240-41; and Eleveurs de Volailles v. Canadian Chicken Marketing Agency [1985] 1

F.C. 280 (F.C.T.D.) at 320-21. See also, e.g., Mehta v. MacKinnon (1985) 67 N.S.R. (2d) 112 (N.S.S.C., Tr. Div.) at 124.

(b) Does s.6(2)(b) embrace intra-provincial mobility rights?

This issue arises out of the situation of those physicians who, like the petitioners Wilson and Arnason, have been issued geographically restricted practitioner numbers. As noted in part 3 of these reasons, s.8.2(2) of the Act provides that no geographic condition may be imposed upon a physician who has been grandfathered by s.8.1(3) or (4). For convenience, I will refer to the non-grandfathered applicant for or holder of a (discretionary) practitioner number under s.8.1(2) as a "new practitioner". The practical import of the geographic restriction is that a new practitioner cannot establish a practice in the geographic area of British Columbia of his or her choice unless the Commission is persuaded that there is a need for an additional physician in his or her type of practice in that area. In short, the new practitioner has a choice between staying or going where the work is (as determined by the Commission's assessment of need for medical services) or not practising in the province. The respondents say that s.6(2)(b) of the Charter has no application to such a limitation on mobility within the province, and they add that the necessity of seeking a livelihood where job or professional opportunities are located is a reality faced by many others in both the public and private sectors of the economy.

The second sentence of the passage quoted under sub-heading (a) above from the reasons of Estey J. in Skapinker indicates that the right conferred by s.6(2)(b) relates only to movement across provincial boundaries for the purpose of employment. To the same effect, earlier in his reasons, Estey J. quoted with

approval the following passages from the dissenting judgment of Arnup J.A. in the court below (at 380-81):

[Section 6(2)(b)] is a clause intended to prevent the erection by any province of barriers established to keep out persons from another province seeking to enter its work force as part of a provincial policy to establish or preserve a preference for its own residents. The permanent resident who goes to another province has a right to pursue the gaining of a livelihood there, whether that person is a lawyer or a class "A" mechanic. . . .

. . .

In my view, the right is a right not to have provincial barriers thrown up against one who wants to work He is not faced with a provincial barrier preventing him, a permanent resident of Canada, from moving freely within Canada to pursue the gaining of a livelihood.

Again, Estey J. referred (at 381) to passages in Malartic Hygrade Gold Mines v. The Queen (1982) 142 D.L.R. (3d) 512 where Deschenes C.J. (as he then was) said that the purpose of this provision was "to prevent artificial barriers from being erected between the provinces".

Most of the more recent decisions on point, including those cited under sub-heading (a) above, confine s.6(2)(b) to the protection of inter-provincial mobility rights: see, e.g., Eleveurs de Volailles v. Canadian Chicken Marketing Agency, supra, where Strayer J. stated (at 320-21):

The Supreme Court [in Skapinker] came to the conclusion that paragraph 6(2)(b) does not create an independent right to gain a livelihood in one's own province independent of some element of interprovincial movement

As in that case there was no extraprovincial element involved, the paragraph was held not to apply to the situation so as to prevent the Province of Ontario from requiring Canadian citizenship for persons joining the Law Society of Upper Canada.

In Black v. Law Society of Alberta [1986] 3 W.W.R. 590 (Alta. C.A.), Kerans J.A. observed (at 605):

The evident object of s.6 is to prevent the erection of provincial barriers establishing or preserving a preference for the residents of the particular province. . . .

The petitioners in the present case relied on Demaere v. Canada (1984) 52 N.R. 288 (F.C.C.A.) where s.6(2)(b) was held applicable to a (federal) restriction on competition for a job opening in one region of British Columbia to the exclusion of applicants, like the appellant, who were resident in another region of the province. (The appeal failed, nevertheless, because the court found that the restriction was authorized by a law of general application within the meaning of the exception in s.6(3)(a)) The Demaere decision pre-dated that of the Supreme Court of Canada in Skapinker and the conclusion expressed in the former as to the scope of s.6(2)(b) cannot be reconciled with the views expressed in Skapinker and in the other cases to which reference has been made.

I conclude, on the authorities, that s.6(2)(b) does not embrace intra-provincial mobility rights.

(c) Do the challenged enactments restrict inter-provincial mobility rights?

In Mia, McEachern C.J. reached the conclusion that the scheme or practice instituted by the Commission in September, 1983, without the benefit of either statutory mandate or guidelines in the regulations, was inconsistent with the right defined in s.6(2)(b) of the Charter. This conclusion appears to have followed upon a finding that the Commission at that time took residency into account and discriminated against out-of-province applicants seeking billing numbers. He stated (at 300):

I have no doubt that this practice does in fact discriminate against the petitioner primarily on the basis of her province of previous residence. Other members of the college have preference or priority regardless of medical qualifications. They are preferred because, unlike the petitioner, they did not previously reside outside the province. That prevents this practice from defeating the petitioner's Charter right even if it could be classified as one of general application.

It is my conclusion, therefore, that the petitioner's s.6(2) Charter right cannot be affected adversely by this scheme or practice as presently constituted, mainly because it prefers provincial residents.

(My emphasis)

As a result of the 1985 amendments, the Commission is now precluded from according preference based on residence in British Columbia. The sole provision in the enactments under review expressly relating to residence as a criterion for granting or denying an application for a practitioner number is regulation 17.08, quoted above, and which, for ease of reference, I set out again:

17.08 In granting a practitioner number to a medical practitioner under section 8.1(2) of the Act, the commission shall not consider the residence or former residence of an applicant in making its decision.



No. A852739
No. A860093
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. A852739)
BETWEEN:)
PETER SAGER WILSON and)
CHRISTYANNE L. MAXSON)
PETITIONERS)

REASONS FOR JUDGMENT

AND:)
THE MEDICAL SERVICES COMMISSION OF)
BRITISH COLUMBIA AND THE ATTORNEY)
GENERAL OF BRITISH COLUMBIA)
RESPONDENTS)

OF THE HONOURABLE

No. A860093)
BETWEEN:)
JO ANN ARNASON, GRAHAM CONWAY,)
KENNETH JOHN FAVERO, CHRISTINE)
JONES, DAVID KEITH WILLIAMS,)
DAVID LEE WILLIAMS and RAYMOND SIU)
HONG KWAN)
PETITIONERS)

MR. JUSTICE LYSYK

AND:)
THE MEDICAL SERVICES COMMISSION OF)
BRITISH COLUMBIA and THE ATTORNEY)
GENERAL OF BRITISH COLUMBIA)
RESPONDENTS)

(IN CHAMBERS)

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Dates and Place of Hearing:

June 9-13, August 25, 27-29, 1986
Vancouver, B.C.

1. OVERVIEW OF THE ISSUES

The petitioners, all of whom are physicians qualified to practice in British Columbia, challenge the constitutional validity of certain provisions of the Medical Service Act R.S.B.C. 1979, c.255, as amended ("the Act") and regulations made pursuant thereto ("the regulations"). These enactments charge the respondent Medical Services Commission ("the Commission") with responsibility for administering the arrangements through which physicians obtain payment from the provincial Medical Services Plan ("the Plan") for insured services rendered to patients. Central to those arrangements is a requirement that any physician seeking to bill the Plan be the holder of a practitioner number issued by the Commission. Under the terms of the impugned enactments, the Commission may in certain circumstances deny the application of a qualified physician for a practitioner number or may issue a number which is subject to geographic or other restrictions.

The petitioners have all sought unsuccessfully to obtain permanent unrestricted practitioner numbers. Some have been issued geographically restricted numbers. Others have obtained numbers restricting them to temporary locum tenens (substitute physician) work. And some remain without numbers. The respondents, the Commission and the Attorney General of British Columbia, concede that the ability to bill the plan which is conferred by a practitioner number is, for all practical purposes, essential to the earning of a livelihood in private practice as a physician in British Columbia.

The constitutional issues raised do not relate to the division of legislative powers between the Parliament of Canada and provincial legislatures. The petitioners acknowledge that these enactments lie within the provincial sphere of

legislative authority and would have been constitutionally unassailable prior to enactment of the Canadian Charter of Rights and Freedoms ("the Charter"). They base their attack on three Charter provisions: s.6 (mobility rights), s.7 (rights to life, liberty and security of the person), and s.15 (equality rights). More specifically, with respect to mobility rights, they rely on the terms of s.6(2)(b) concerning the right of every Canadian citizen and permanent resident to pursue the gaining of a livelihood in any province. Next, as to s.7, they say the impugned enactments interfere with the right to liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Finally, they claim infringement or denial of the right defined by s.15(1) to the equal protection and equal benefit of the law without discrimination.

Section 1 of the Charter guarantees all rights and freedoms set out in the Charter subject only to reasonable limits. In the terms of s.1, these must be "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The petitioners say that the impugned enactments limit their rights under one or more of ss. 6, 7 and 15 and that those limits are not reasonable. There is some common ground concerning s.1 issues. The parties agree that the limitations in issue are ones "prescribed by law". They agree that if the challenged enactments limit one of the rights set out in ss. 6, 7 or 15 the respondents carry the burden of establishing the reasonableness of such limit(s). They agree that in determining whether a limit upon such rights can be supported as reasonable under s.1 the tests to be applied are those laid down by the Supreme Court of Canada in Regina v. Oakes [1986] 1 S.C.R. 103. Battle was not fully joined on the s.1 issue, however. The respondents say that none of the rights set out in ss. 6, 7 and 15 are violated by these enactments and so no inquiry under s.1 is called for. Accordingly,

counsel for the respondents made no attempt to invoke s.1 in support of the legislation. Counsel for all parties did, however, make submissions concerning the relationship between s.1 and the right-defining provisions, particularly s.15, and this issue will require attention.

To this point it has not been necessary to distinguish between the two applications which were, by agreement, heard together. The petitioners in the first application are Drs. Wilson and Maxson. The style of cause in the second application lists seven petitioners but three -- Drs. Jones, D.K. Williams and Favero -- were issued practitioner numbers prior to conclusion of the hearing and are no longer interested in these proceedings. The four remaining are Drs. Arnason, Conway, D.L. Williams and Kwan. For convenience, I will refer to the two petitioners in the first application as "the Wilson group" and the four remaining petitioners in the second application as "the Arnason group".

All petitioners challenge the constitutional validity of the enactments on the basis of the Charter provisions to which reference has been made. In addition, however, the Arnason group advances an argument in the alternative attacking on administrative law grounds the fairness of the process by which practitioner numbers were either denied or issued subject to certain restrictions.

Both groups concede that another type of administrative law argument, raised successfully in a challenge to the immediate predecessor of the present practitioner number system, cannot prevail in the present proceedings. This earlier scheme, utilizing payment (billing) numbers and similar in nature to the present one, was instituted by the Commission in the fall of 1983. The challenge came in Re Mia

and Medical Services Commission of British Columbia (1985) 17 D.L.R. (4th) 385 (B.C.S.C.). Dr. Mia had applied for, but was denied, a billing number for purposes of practising medicine in Kamloops, British Columbia. Chief Justice McEachern noted (at 390-391) that the Act at that time made no mention of billing numbers and that neither the Act nor the regulations specifically authorized the Commission to limit the number of physicians who could practise in the province or to prescribe where a physician could practise. The question for determination, therefore, was whether authority for the scheme could be found by inference in the Commission's mandate to administer the provisions of the Plan relating to voluntary medical care insurance. He concluded (at 399-402) that such authority could not be found. The scheme which the Commission had been administering was held to be ultra vires in the administrative law sense that the terms of the Act did not provide a statutory base for it.

The decision of the Chief Justice was not appealed. However, the Act and regulations were subsequently amended ("the 1985 amendments") to establish the practitioner number system challenged in the present proceedings. It is not disputed that the amended enactments, if constitutionally valid, provide an adequate legislative underpinning for the practitioner number scheme.

2. THE PETITIONERS

As previously stated, all of the petitioners have sought and been denied permanent unrestricted practitioner numbers. All are licensed to practice medicine in British Columbia and all are general practitioners.

(a) The Wilson Group

Dr. Wilson and Dr. Maxson are native British Columbians (both born in Kelowna). Both are graduates in Medicine from the University of British Columbia. Both have been issued restricted numbers.

Dr. Wilson obtained his M.D. in 1982 and interned in Newfoundland. He practised for a short time in Newfoundland and then Ontario. In December of 1985 he was issued a practitioner number for locum tenens work. In January of 1986 he was granted a permanent practitioner number restricted to the Central Okanagan Regional District.

Dr. Maxson undertook her internship in Saskatchewan, completing it in mid-1985. She was granted a number for locum tenens purposes and she presently holds what her affidavit describes as "long term locum privileges at the Kelowna General Hospital".

(b) The Arnason Group

Two members of this group (Drs. Arnason and Kwan) have been issued restricted practitioner numbers while the other two (Drs. Conway and Williams) have been denied numbers.

Dr. Arnason is from Manitoba and obtained her M.D. from the University of Manitoba in 1984. After her internship in Victoria, British Columbia, which she

completed in mid-1985, she joined a medical clinic in that city. In August, 1985 she was granted a number restricted to the Capital Regional District (Victoria).

Dr. Conway was born in England and received most of his education in Ontario. He obtained an M.D. from Queen's University in 1967 after which he interned in Vancouver and practised medicine in British Columbia until 1979. Since then he has been working as a physician, educator and administrator of health services in Micronesia. He held a billing number until 1985. He received a form letter from the Commission dated July 15, 1985, which referred to the 1985 amendments and advised him that the number he then held was deemed by the Commission to be inactive. This was on the assumption that he could not meet the criteria laid down in the 1985 amendments respecting previous participation in the Plan in the statutorily defined period (a two-year period preceding the coming into force of the relevant amendments to the Act on May 30, 1985) which would entitle him to a practitioner number as of right under the new system. Unless he could satisfy the Commission that he had participated in the Plan during that period, he would be required to apply for a new practitioner number according to the procedures outlined in the letter. The letter advised that new practitioner numbers issued under this authority would be subject to conditions, including geographic restrictions. The Commission's position is that Dr. Conway's application for a (discretionary) practitioner number remains incomplete.

Dr. D. L. Williams was born and educated in British Columbia. He received his M.D. from the University of British Columbia in 1975. He carried on a general practice in Dawson Creek, British Columbia from 1976 to 1981, after which he moved to Nova Scotia where he continues to practise. He received the same form

letter dated July 15, 1985 as had Dr. Conway. The Commission's position with respect to Dr. Williams is essentially the same as it is with respect to Dr. Conway.

Dr. Kwan received his secondary and post-secondary education in British Columbia. He obtained his M.D. from the University of British Columbia in 1984 and interned in Saskatchewan from mid-1984 to mid-1985. In December of 1985 the Commission granted him a number for locum tenens work. In February, 1986 he advised the Commission of his intention to purchase a practice in Vancouver and requested a permanent practitioner number. In March, 1986 the Commission denied his request on the basis of lack of need for additional general practitioners in the area.

3. THE FACTUAL CONTEXT AND LEGISLATIVE FRAMEWORK

The Plan established pursuant to the Act and regulations provides for a system of insurance for medical services available to all residents of British Columbia. The Plan is administered by the Commission which at present consists of one person, Dr. D. M. Bolton. Commission records show that over 99% of British Columbia's population is insured for medical services under the Plan.

Almost all physicians in British Columbia participate in the Plan by billing it for insured services rendered to patients. Under the impugned enactments a physician requires a practitioner number in order to participate. A physician who has been issued such a number may, but is unlikely to, opt out of the Plan. This appears from the following extract from the affidavit of Dr. Rigby, the Executive Director of the British Columbia Medical Association ("BCMA"):

26. Theoretically, it is legally possible for a medical practitioner to practice medicine without participating in the Plan, by "opting out" and billing patients directly for his services. The patient in such a case must make a claim against the Plan for the fee as billed. However, the vast majority of patients are unwilling to go through this procedure, and in the few cases of "opted out" doctors of which I am aware, payment has been very slow and the patient normally wishes to delay paying his doctor until payment has been received by the patient from the Plan. In addition, unless a practitioner rendering services outside the Plan has a practitioner number, his patient will not be reimbursed for his services by the Plan at all, since such practitioner's services will not constitute "insured services" within the meaning of the Medical Service Act as amended by Bill 41 [the 1985 amendments effective May 30, 1985]. Thus a medical practitioner who does not have a number must bill his patient and his patient will not be reimbursed by the Plan.

27. I am aware of six cases of physicians who have "opted out" of the Plan over the past ten years, not including one who was involuntarily opted out by order of the Commission. Of these, three found that it was very impractical to continue on that basis and have opted back into the Plan; and it is my understanding that one practices holistic medicine, which is not insured under the Plan. Based on information supplied to BCMA by the Commission, there are now only two practitioners operating in British Columbia outside the Plan, both of whom have practitioner numbers.

The thrust of this uncontradicted evidence is that in practical terms it is not possible to gain a livelihood in private practice as a physician in British Columbia without holding a practitioner number conferring the right to bill the Plan. As stated at the outset, this much is conceded by the respondents in the present proceedings.

The issuance of payment or billing numbers to physicians for administrative purposes in processing claims for payment from the Plan is not new. But prior to 1983 applications from qualified physicians registered with and licensed by the College of Physicians and Surgeons of British Columbia were granted routinely and promptly. In July of that year, in apparent response to concerns about oversupply

and maldistribution of physicians in British Columbia, a bill to amend the Act had been introduced in the legislature which, inter alia, purported to authorize the Commission to impose conditions, including geographical restrictions, on billing numbers. This bill was never enacted into law. However, in September of 1983 the Commission implemented a scheme pursuant to which issuance of new billing numbers would be discretionary and geographically limited. This was the scheme in place when Dr. Mia was denied a number and which was considered in the Mia case, to which reference has been made above.

In his reasons for judgment in Mia, the Chief Justice reviewed comprehensively the legislation and relevant regulations then in existence, the circumstances in which the billing number system was developed, the reasons that had been advanced for instituting it, and the mechanics of its administration. He summarized the leading features of the regime instituted in September, 1983 in the following terms (at 399):

In something as diffuse as medical services plan it is inevitable that problems will not be one-dimensional. For the purposes of this judgment I propose to treat the initiation of the payment number scheme as a "practice" (which I shall refer to as a scheme or practice) which has been grafted onto the plan. For practical purposes I think the scheme has three main components which are interrelated:

- (1) the issuing of payment numbers as a control mechanism for attaining government objectives, viz:
 - (a) limiting provincial expenditures for medical services; and
 - (b) ensuring adequate medical services in rural areas;
- (2) establishing "need for services" in relation to provincial locations or communities as the basis for granting new billing numbers; and
- (3) determining which new practitioners shall be granted billing numbers mainly on the basis of residence (after "grandfathering" etc.), if a need for service is

established.

It will thus be seen that the scheme permits the Commission, after "grandfathering", etc., to determine who may practise medicine in British Columbia and where they may practise although it is possible that the Commission's decision in a particular case may coincide with the wishes of an applicant. Once a location is designated, however, a physician may not move without the approval of the Commission. It follows, therefore, that the Commission positively determines where some practitioners will practise and negatively limits others from practice at all, or prevents any physician from moving his practice from one designated location to another. It goes without saying that the designation of where a physician may practise also determines where, within reasonable limits, he must live.

The references to "grandfathering" in the above passage are to the policy of granting payment numbers automatically to physicians who had been in active practice in British Columbia during the two year period which preceded introduction of that scheme in September, 1983. It is not disputed that the policy objectives behind the practitioner number system established by the 1985 amendments are essentially the same as those underlying the scheme instituted by the Commission in September, 1983.

As previously noted, the Act as it stood at the time of Mia made no provision for the billing number scheme. The 1985 amendments to the Act repaired this omission by expressly authorizing the Commission to issue practitioner numbers and to impose certain conditions upon the recipients of such numbers. The material provisions now appear as ss.8.1 and 8.2 of the Act which read as follows:

Practitioner numbers

8.1 (1) In this section "practitioner" means a practitioner who does not have a practitioner number.

(2) The commission may, in accordance with the

regulations, grant a practitioner number under the plan to a practitioner.

(3) On the request of a practitioner made not later than 90 days after the date this section comes into force, the commission shall grant a practitioner number under this section to that practitioner where he

(a) submitted, on or before September 1, 1983 but before the date this section comes into force, a completed application to the commission for a number permitting reimbursement under the plan, or

(b) participated in the plan at any time within the 2 year period immediately preceding the date this section comes into force and has not been declared to be outside the plan for cause.

(4) Notwithstanding subsection (3), where the commission is satisfied that a practitioner has actively participated in the plan during the 6 month period immediately preceding the date section 3 of the Medical Service Amendment Act, 1985 came into force and has not been declared to be outside the plan for cause, the commission shall grant a practitioner number to that practitioner without receipt of a request.

Conditions on practitioners

8.2 (1) The commission may impose one or more of the following conditions on a practitioner:

(a) a condition that restricts reimbursement under the plan to insured services rendered by the practitioner within the geographic area specified in the condition;

(b) a condition that prohibits the transfer of his practitioner number to any other person;

(c) a condition that restricts the term of his practitioner number to a period specified by the commission, where the practitioner number permits the practitioner to submit claims to the commission for insured services rendered by him

(i) during his postgraduate training, or

(ii) in order to carry on the practice of another practitioner while that practitioner is absent;

(d) a condition that permits the practitioner to submit claims to the commission solely for insured services rendered by him in order to carry on the practice of another practitioner while that practitioner is absent.

(2) The commission shall not impose the condition referred to in subsection (1)(a) on a practitioner who holds a

practitioner number that the commission was required to grant under section 8.1(3) or (4).

The salient features of these provisions, briefly stated, are the following.

In the case of a "practitioner" (defined by s.8.1(1) for the purposes of the section as one who does not have a practitioner number) who cannot qualify under subsections (3) or (4) and to whom subsection (2) of that section therefore applies, the Commission has a discretion as to whether or not to grant a practitioner number and, if it does grant a number, the Commission may impose conditions restricting reimbursement from the plan to services rendered within a specified geographic area (s.8.2(1)(a)) or for a specified period of time (s.8.2(1)(c)) or for a specified purpose (s.8.2(1)(d)). (I will sometimes refer to a practitioner number granted subject to a condition under s.8.1 as a "restricted number".) Practitioners qualifying under s.8.1(3) and (4) are "grandfathered". The Commission was and is required to issue practitioner numbers to them and, by the terms of s.8.2(2), it cannot impose geographic restrictions on these grandfathered physicians.

Section 9(1) of the Act provides that the Lieutenant Governor in Council may by regulation establish a voluntary medical services plan and may make regulations on a wide variety of matters including the following:

- (j) respecting the application for, granting, suspension and cancellation of practitioner numbers, including the establishment of criteria to be considered by the commission in granting practitioner numbers based on, but not limited to,
 - (i) any factor that encourages an efficient distribution of practitioners or a class of practitioners in the Province or in any geographic area specified in the regulations; and

- (ii) in the case of a class of applicants for practitioner numbers, whether an applicant of that class has full hospital admitting privileges;
- (k) establishing geographic areas for the purpose of granting practitioner numbers; . . .

Division 17 of the regulations deals with the allocation of practitioner numbers. Section 17.02 establishes as "practitioner areas" the 34 geographic areas of the province listed in Schedule 1 to the regulations. Section 17.04 provides that before granting a practitioner number under s.8.1(2) of the Act (i.e., to a physician not grandfathered under subsections (3) or (4)), the Commission shall comply with ss.17.05 to 17.08 of the regulations. They read as follows:

**General criteria to be examined
by the commission**

17.05 (1) The commission shall consider whether the ratio of the population in the practitioner area to the number of full time equivalent medical practitioners in the type of practice that an applicant for a practitioner number for the practitioner area will be carrying on exceeds the ratio set out in Schedule 2.

(2) The commission shall determine whether an applicant has full hospital admitting privileges at a hospital in the practitioner area for which he has applied for a practitioner number.

(3) The commission shall consider whether the hospital at which an applicant has been granted full hospital admitting privileges has a demonstrated need for medical practitioners in the type of practice that the applicant will be carrying on.

Ranking of applicants

17.06 Where there are 2 or more applicants for one practitioner number for the same practitioner area who

- (a) will be carrying on the same type of practice, and
- (b) have full hospital admitting privileges at a hospital in that practitioner area that has a demonstrated need for medical practitioners in the type of practice that the applicants will be carrying on,

the commission may only grant a practitioner number to the applicant with the earliest time and date stamped on his application.

Specific medical need

17.07 Notwithstanding section 17.06, where the commission considers that there is a specific medical or community need in a practitioner area that justifies granting a practitioner number for that area, it may grant the practitioner number to the applicant who, due to his medical training or qualifications, or other training or qualifications, is the best able to fill that specific medical or community need.

Residence

17.08 In granting a practitioner number to a medical practitioner under section 8.1(2) of the Act, the commission shall not consider the residence or former residence of an applicant in making its decision.

The foregoing provisions of Division 17 were made as B.C. Reg. 154/85. Later in 1985, by B.C. Reg. 330/85, s.17.09 was added. It reads as follows:

17.09 Notwithstanding sections 17.04 to 17.06 the commission may grant a practitioner number to an applicant who was employed in the Province on May 30, 1985.

Schedule 2 to the regulations, referred to in s.17.05 above, sets out 20 types of medical practice, together with ratios of population to Full Time Equivalent (FTE) medical practitioners for the specified types of practice in specified practitioner areas. In broad terms, then, the Commission's mandate, as reflected especially in s.17.05, is to exercise the discretion given to it by the Act with respect to issuance of new practitioner numbers in accordance with guidelines supplied by the

regulations with a view to matching the needs of specified (geographic) practitioner areas in the province with physicians engaged in specified types of medical practice.

Reference was made in part 2 of these reasons to the form letter dated July 15, 1985 which was directed by the Commission to Drs. Conway and D. L. Williams. The following extract from that letter addresses the procedures to be followed by physicians who were not grandfathered by the legislation and who wished to obtain practitioner numbers:

[The enactments provide] that practitioner numbers may be issued, after consideration of the ratio of physicians to population in the area in which the applicant would like to practise; after considering whether the applicant has full admitting privileges at a hospital; and whether that hospital has a demonstrated need for medical practitioners of the type of practise of the applicant. Practitioner numbers issued under this authority will have conditions including geographic restrictions.

Physicians applying for permanent ~~fee-for-service~~ practitioner numbers should seek hospital privileges and a statement of need from the medical manpower committee of a hospital in the area in which they practise. Applications for locum tenens practitioner numbers do not require hospital privileges or a statement of need.

Practitioner numbers issued for locum purposes are restricted for use only in the temporary replacement of a physician in an established practice for a period of time during which the permanent physician is absent from this practice. This number will not permit replacement of physicians on a regular basis for short periods such as one day per week. Such numbers are valid only for six months. To have a practitioner number extended beyond that date, the physician will be required to submit a list of the locum tenens done during the previous six month period.

The whole of Division 17 was added to the regulations in 1985. It complemented the 1985 amendments to the Act which, in turn, represented a legislative response to the Mia decision. As already stated, it is common ground that the 1985 amendments preclude the petitioners in the present proceedings from relying upon the administrative law argument successfully advanced in the Mia case to the effect that the scheme then in place lacked a statutory foundation. Given that the new practitioner number system is securely anchored in the Act and regulations, the question squarely raised in the present proceedings is whether these enactments offend the Charter.

4. EVIDENCE RELATING TO POLICY EFFECTUATED BY THE CHALLENGED ENACTMENTS

Stripped to essentials, the twin policy objectives behind the enactments are cost control and improved distribution of physicians throughout the province. The practitioner number system described above constitutes the means the government has chosen, as a matter of policy, to achieve these objectives. Here I refer to evidence which relates to ends and means in this broad sense, as opposed to the merely technical aspects of the present practitioner number system or its administration. The former type of evidence bears upon the merits of any regulatory regime involving the denial of participation in the Plan to some qualified physicians wishing to practise in British Columbia, or the placing of geographic restrictions on where they may practise, or both.

A substantial body of such evidence was filed at the hearing by agreement or without objection taken as to admissibility. Some of it took the form of affidavits

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**DEFENDING THE WRITER
UNDER THE NEW PORNOGRAPHY LAW**

- D R A F T -

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INTRODUCTION

Much has been written about the excesses of the government's proposed pornography legislation, Bill C-54.¹ Since most criminal prosecutions in recent memory have been of visual materials, it is easy to forget that both the existing obscenity law and the proposed pornography amendment also apply to written text. Indeed the amendments before Parliament put the prosecution of the written word on a different footing than that of the visual. Canadian authors of every stripe should be aware of the complex new rules and legal uncertainty they will face especially when dealing with certain controversial sexual subjects.

Of special interest to writers is the proposed Section 138(b). It makes pornographic any "matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v)".² These subsections are children and sex, sexual mutilation, sexual violence, sexual degradation, bestiality and incest. It excludes subparagraph (vi), "masturbation, ejaculation ... vaginal, anal or oral intercourse", but it is well to remember that the children and sex definition is extraordinarily broad covering all sex or sexual nudity if children are participating or even present. The definition has been severely criticized by civil libertarians of all stripes, and almost all progressive sex educators.

¹ I wish to acknowledge the helpful comments of Ellen Murray and Peter Bartlett.

² The most important sections of the proposed legislation are included in Appendix I.

Section 138(b) covers not just sex toys and solicitations for sex, but also fiction and journalistic essays, serious or erotic, which touch on the forbidden topics. This means, for example, that society will jail not only those who sell pictures of incest, but also those who merely write about it and are taken to incite or advocate it.

For those who had hoped the proposed amendments would focus exclusively on visual material and leave writers free of any threat of criminal sanction, Section 138(b) is a real shock. There are numerous and obvious problems with these words and they amount to a profound threat to the free expression of ideas about these sexual topics.

The following is intended as a brief summary of the problems facing writers under the new legislation, particularly Sections 138(b) and 159.1(1), the defense of "artistic merit". It considers the problems and issues that will be raised in defending charges under the proposed legislation both from the point of view of interpreting the words in the Criminal Code and also as the Charter of Rights may require they be interpreted. It goes on to discuss the pivotal significance of the word "degrading". There are a number of things it does not do. Enough has been said elsewhere about the principle that censorship of any sort is unjustifiable, if not unconstitutional. Nor does it deal with the grossly restrictive definition in Section 138(a)(i) on children and sex.

The statutory history of obscenity legislation and its judicial interpretation are of some assistance in anticipating the meaning likely to be given to this proposed legislation. So are the comparable Criminal Code provisions on "hate propaganda" and the history of American litigation on obscenity and the Bill of Rights. But nothing really provides any certainty, except the certainty there will be a great deal of litigation. When dealing with certain controversial sexual topics, writers with even the most serious intent will be plagued with legal problems. Not only is freedom of expression infringed for unjustifiable reasons; this is done in a manner guaranteed to cause maximum confusion. Confusion breeds caution, and caution hesitation. Our American cousins call this "the chilling effect".

A) THE EXISTING OBSCENITY DEFINITION

The existing definition of obscenity makes criminal the "undue exploitation of sex", usually interpreted to mean sex that violates the community's standard of decency. In making comparisons to the proposed new definition of pornography we should remember that the existing law applies indiscriminately to the whole range of sexual subjects, while under the new law defenses will vary depending on the category of pornography. The

problems interpreting "community standards" are notorious, but it is noteworthy that the author's purpose and artistic merit have been held to be relevant though not decisive element to whether or not the exploitation of sex was "undue". The primary test is community tolerance, and the judges' conceived notion of what that might be. The Crown is not even required to lead evidence of what the community might be. Indeed, one of the profound absurdities of modern jurisprudence is the so called expert evidence and judicial opinions pretending to divine the community's level of tolerance. Speaking on behalf of the tolerance of others is inevitably a thinly disguised assertion of personal moral standards.

In the leading case of Brodie v. Her Majesty The Queen, [1962] S.C.R. 681, the Supreme Court of Canada interpreted the then new obscenity definition which was adopted in 1959, S.C., 41, Sec. 11. The case concerned the book Lady Chatterley's Lover, by D. H. Lawrence. The court ruled that the ancient test in R. v. Hicklin, (1868), L.R. 3 Queen's Bench 360, it was no longer the law. The "Hicklin Test" was the famous Victorian definition of obscenity, as that which "tended to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall". The "Hicklin test" held that the intentions of the authors and publishers were irrelevant. It required that the "tendency" was referable to the more vulnerable members of society.

In Brodie our Supreme Court admitted expert evidence on artist merit in order to help define with the exploitation of sex was an "undue characteristic" of the book. But it should be noted that proof of artistic purpose has never been a sufficient defense under the current obscenity law.³ The Ontario Court of Appeal has ruled that items in a well known and established art gallery, accepted as "art" by all the "art world" as least, as well as many others, could nevertheless still violate the obscenity law. Note that under the current law, the "motives" of the accused baldly stated are not relevant according to the Code. Sec. 159(5). It is the author's intention as evidence of artistic merit that is admissible, not good intentions themselves.

Finally, we should note that to date the Supreme Court of Canada has not ruled on the constitutionality of the existing obscenity definition.

B) "INCITES, PROMOTES, ENCOURAGES OR ADVOCATES"

The meaning of the words "incite, promote, encourage and advocate" in the proposed legislation is inherently ambiguous on

³ See R. v. Cameron, [1968] 2 OR 777.

certain important issues. One has only to listen to a sexual conservative arguing that straight-forward birth control information "promotes" teenage sex to realize the meaning of the words are dangerously elusive. Does the new offence focus on the subjective intention of the author to incite or promote, or at the other extreme, do the words require proof that there has been actual incitement or encouragement as evidence by the deeds of the reader? If incitement evidenced by action is too stiff a test, is incitement of thoughts, or thoughts tending toward action, sufficient? And who is "the reader"? Is it the mythical "average" reader, or will any vulnerable or weak-minded citizen do?

To twist the question a little, let us ask whether a defence could be mounted where an author truly intends to advocate the particular activity, but in fact the work has the opposite impact on most of its audience. It is not difficult to imagine, for example, a book advocating unusual sex, such as "S & M", where in fact the book has the opposite effect on the vast majority of readers who are repulsed. Can there be "incitement" or "advocacy" when there is no actual incitement? Or is incitement of a few enough? If a straight factual study of incest is taken by a disturbed reader as promoting the activity, is the author guilty notwithstanding his actual intention that his book deter incest? Will it be necessary to insert explicit and brutal words of condemnation every time the forbidden subjects are mentioned?

The four words chosen - incite, promote, encourage or advocate - may differ in the amount of intent and effect they imply as constituent elements of the offence. But none of them tell us clearly whether it is the author's intention on the one hand, or the real effect of the words complained on the other, that is the gravamen of the offence. Their differences matter little in a defence under the Criminal Code since a charge can be framed in the alternative. However, they may assume much greater importance in arguments under the Charter of Rights. (See below).

i) Effect

Section 138(b) appears to be a fundamental reorientation of Criminal Law for writers. The existing definition of obscenity makes criminal "the undue exploitation of sex", and undue is defined as that which violates community standards of decency. Artistic merit is accepted as relevant to whether the exploitation as sex is "undue", on the unarticulated premise that the public may be more tolerant of sex in "art".

Generally speaking, this shift indicates a turn away from a focus on the public reaction to questionable material and towards an examination of the nature of the material itself. However, there are still important potential elements of the offence that may

*better crafted by
the legislative drafters,*

require an examination of the impact on the public, as opposed to public tolerance.

A stranger shift in this direction might have been a timely one. A vast amount of literature has been generated in the last twenty years by social scientists interested in the effect on viewers of violent and sexually violent film and video. Our ability to define cause and effect in the area has been immensely refined by the vigorous, sometimes polemical contemporary debate on this subject.⁴ Various studies claim to show how certain types of videos influence attitudes and actions for shorter or longer periods of time, or, on the other hand, have no noticeable impact at all. The debate has not produced any conclusive answers, but it is clearly a debate about the "right question".

Fifty years of American "free speech" litigation has produced and refined what is known as the "clear and present danger" test.⁵ At the risk of oversimplifying, we can define this rule as follows: speech which appears to advocate a breach of the peace is nevertheless protected by constitutional guarantees of freedom of speech until there is a "clear and present danger" that a breach of the peace will take place. The case law in this area typically involves political speeches and demonstrations. Under American jurisprudence, material found to be obscene is not protected by constitutional guarantees of free speech and this test does not apply.

But, I would argue, a test of this nature ought to be applied to alleged pornography. Once provision has been made to restrict distribution of material to children under 18 (not a difficult task), then society's legitimate concern is only the clear and present danger of violence, whether sexual or not, of one member against another. A "clear and present danger" test regarding these specific provisions of the Code dealing with sexual violence makes sense. We may ultimately reject this as censorship in any event, but the point is that it addresses the real and legitimate issue in our society. It would force the Court to ask the hard questions about the real effect of the allegedly pornographic material. Such an approach admittedly leaves no scope for morality as the basis of criminal sanction,

⁴ See, for example, Burstyn, Varda (ed.), Women Against Censorship, Douglas & McIntyre, Toronto, 1985; Copp, David and Wendell, Susan, (eds.), Pornography and Censorship, Prometheus Books, Buffalo, 1983; Report of the Attorney General's Commission on Pornography, Department of Justice, United States, 1986.

⁵ There are many books on that subject. Among the standard reference sources are: Lockhart, William B., Constitutional Law - Cases - Comments - Questions, West Publishing.

but society's real concerns today are the prevention of violence, not private sexual practices.

There is little likelihood that the proposed new Criminal Code provision will be interpreted to introduce a "real effect" as a constituent element of the offence. While the word "incite" seems to imply the necessity of a real impact on the reader, the word "advocate" does not. (The equivalent expressions would be "attempt to incite" and "advocate"). However, since criminal charges can be laid in the alternative the opportunity to argue the higher burden of proof regarding "incitement" will not arise.

It is useful to recall the famous "Hicklin test" of obscenity. This was the pre-eminent definition of obscenity in the United Kingdom, Canada and the United States for the better part of the last century. It arose in the case of R. v. Hicklin (1868), L.R. 3QB 360, in which Lord Chief Justice Cockburn said:

I think the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and unto those whose hands a publication of this sort may fall.

Hicklin, by the way, was the magistrate whose decision went on appeal, not the accused. The case concerned the distribution by the Protestant Electoral Union, the accused, of an ancient tract entitled The Confessional Unmasked: Showing the Depravity of the Romanist Priesthood, the Inequity of the Confessional and the Question Put to Females in Confession. Cockburn found that it was "quite certain" that The Confessional Unmasked

would suggest to the mind of the young of either sex or even to persons of more advanced years, thought of a most impure and libelous character....This work I am told is sold at the corners of streets and in all directions and of course falls into the hands of persons of all classes, young and old and the minds of those hitherto pure are exposed to the dangers of contamination and pollution from the impurity it contains. ⁶

The point to made is that Lord Justice Cockburn did not embark on any inquires as to the real impact of the alleged material. He presumed sexual material would tend to deprave. He imagined the impact of offensive material on the vulnerable young mind and convicted on that basis. And this presumptuous approach governed

⁶ See Kendrick, Walter, The Secret Musemen: Pornography in Modern Culture, Viking, New York, 1987, Pages 121 to 123.

interpretation of obscenity up until the time the "Hicklin test" was abandoned in Canada by Criminal Code amendments in 1959.

The American case law on political free speech applying the "clear and present danger" test is also from beginning to end an exercise of judicial reconstruction and imagination. The case law does not focus on the real impact on the words or the actual behaviour of the crowd. The court constructs a presumed effect. It must be said, however, that there are enough references in the cases to police witnesses claiming that "the crowd was getting restless" that we can surmise that at least the court was slightly interested in evidence of real impact.

The "hate literature" provisions in the Criminal Code provide a further example of the court's strong disinclination to look at the real effect. These Criminal Code provisions are attached in Appendix II and are discussed in more detail below. Suffice to say here that no proof that hatred has actually been generated is required for conviction, only that the author or spokesman intended it to be so, or ought to have known it to be the normal consequence of the words in question.

Charter Challenge

Notwithstanding the unlikelihood of getting to "real effect" in the course of interpreting the wording of the legislation itself, there is a reasonable prospect that the application of the Charter of Rights may require this.

The Canadian Charter differs in its structure from its American cousin. Our Charter proclaims certain freedoms, and, in this particular case, "freedom of expression" will be relied upon. The Charter goes on to say in Section 1 that the guaranteed freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Litigation regarding constitutional rights is often referred to as a "judicial balancing act". The interests of society have to be balanced against those of the individual. No constitutional wording can be sufficiently specific to tell us precisely how this will be done in all cases. The approach our courts will take to these problems is only beginning to unfold. The strong tendency at present is to make a determination whether or not a particular piece of legislation violates the fundamental freedoms and if so cast the burden on the government to justify the legislation under Section 1. The extent to which that justification requires real evidence is not yet clear. 7 In

⁷ See Re Southam (No.1) (1983), 3 CCC (3d) SIS, 41 OR (2d) 113 (OCA), which states evidence must be presented as to reasonableness. Cf. Re Reich (1984), 8 DLR (4th) 696, 31 ALR (2d) 205 (QB), which makes use of judicial notice instead of the

some decisions, the Supreme Court has urged counsel to present more fulsome briefs on the point. The type of evidence preferred is generally expert evidence about the nature of the "problem" being addressed in the particular legislation impugned. However, there are many decisions by courts at all levels which treat "demonstrable justification" as something that can be inferred from obvious and known social principles without evidentiary proof.⁸

Defense lawyers will challenge the constitutionality of the offenses of "encouraging and promoting" sexual activity on the basis that there must be real, demonstrable evidence that this is necessary legislation. "Incitement" of prohibited sexual activity may survive a Charter challenge precisely because it does imply the necessity of real evidence proving actual effect. They will argue that to criminalize speech that has no significant effect on its readers causing harm to another person is an unreasonable limit on free speech and not "demonstrably justified". Posed in this fashion, the Charter challenge will compel an evaluation of the difficult and voluminous evidence referred to above regarding the alleged impact of violent pornography.⁹ On the list of difficult litigation which this essay attempts to catalogue, this issue will no doubt be the longest, most passionate, most difficult and certainly the most expensive.

Sparrow ii) Author's Intention

presentation of evidence to make a finding under s.1 of the Charter. The former position is arguably more consistent with R. v. Oakes, [1986], SCR 103, 24 CCC (3d) 321, 26 DLR (4th) 200.

⁸ By comparison, decisions interpreting the American Bill of Rights do not refer to any general "saving" section like our Section 1; there is none. The "balancing" function of American constitutional litigation is done by interpretation of the breadth of the words of the constitution such as "freedom of speech". Interestingly, obscenity in the United States has been found to be unprotected speech. Thus, the standard balancing function regarding free speech expressed in the phrase "clear and present danger" does not take place regarding allegedly obscene language. But there is a long line of cases attempting to interpret what is "obscene" and thus unprotected, a "balancing" act by another name. The significance of all of this is that the American constitutional litigation regarding the meaning of obscenity is probably not very helpful to the law as it ought to develop in Canada.

⁹ We should note that the U.S. Supreme Court has explicitly rejected the necessity of hard proof. See Paris Adult Theatre v. Slaton, 413 US 49, cited Lockhart, 1980, p. 893.

The words "promote, encourage and advocate", if not "incite", seem to indicate a requirement that the crown prove some degree of intention. This, however, should not be read as equivalent to the author's intention, which would be safe haven for an accused writer. Section 138(b) refers to "communication that...promotes, encourages..." The author's intention per se may not be the issue. A defense based on sincere, bona fide, or serious intention is in difficulty.

Further reason to be pessimistic can be found in the limited caselaw interpreting the "hate literature" provisions of the Criminal Code, Section 281. Some offenses in Section 281 are for "wilful promotion" and others for simple unmodified "advocacy" or "incitement. In R. v. Buzzanga and Durocher, 25 O.R.(2d) 705 the Ontario Court of Appeal ruled that in the context of Sec.281 "wilfully" indicated an element of the offence to be proved is a "conscious purpose" to promote hatred, or that the accused was "certain or morally certain" that the promotion of hatred would result.

There is a great danger that the Court will draw the negative inference that the absence of the word wilfully from Sec. 138(b) implies that it is irrelevant whether the author intended or knew that their words would have the effect alleged. Thus the prosecuting Crown Attorney will not have to prove a specific intent.

We are likely to hear language something like this - the author is presumed to intend the natural and ordinary meaning of his words, notwithstanding a contrary self-proclaimed private meanings. Which is to say the author's purpose - if an unacceptable purpose in the eyes of the judge is not, in law, the author's purpose.

C) DEFENCE OF ARTISTIC MERIT OR EDUCATIONAL PURPOSE

Under the proposed legislation, "artistic merit or an educational, scientific or medical purpose", Section 159.1(1), will be a defense with respect to Section 138(a) (iii) to (v), but not (i) and (ii). "Incitement" in writing of (vi) (garden variety intercourse) is not an offence and thus it will not be a crime to advocate sexual intercourse. It will be a crime without defense to advocate sex or sexual nudity by or in the presence of those under eighteen, and similarly sexual mutilation. And for those seeking to defend the discussion of sexual violence, degradation, bestiality, necrophilia and incest, the burden of proving the defense of artistic merit or educational purpose will fall on the writer or publisher. For example, Bear, by Marian Engel, may be prosecuted for promoting bestiality or a factual book, or novel about incest, may be accused. The author or

publisher will have to prove "artistic merit or educational purpose".

It has already been the subject of much comment that the burden of proving this defence lies on the accused. It is entirely predictable that one of the first Charter challenges to the proposed legislation will focus on this issue. The caselaw under the Charter gives us some reason to be optimistic that this "reverse onus" will be overturned by the Court.¹⁰ The legal issues here are complex. The defence will argue that "freedom of expression" requires that works of "artistic merit or educational purpose" be protected. To put the burden of proof of this essential element of the offence on the writer or publisher is a total reversal of our long cherished presumption of innocence. The issue will surely not be resolved by anything less than a decision of the Supreme Court of Canada.

We should note in passing that there will no doubt be a parallel Charter case on the complete denial of the defense to works of adolescents and sex, Section 138(a)(i). When Romeo and Juliet or Show Me are prosecuted, there will be no defense of artistic merit or educational purpose unless required as a result of a Charter challenge.

i) Artistic Merit

Under the proposed new legislation, we should not expect that an author's artistic purpose will be treated as equivalent to "artistic merit". The phrase implies an evaluation of quality, rather than of intent. Evidence from authors about their purpose or intention will be admissible as relevant to, but certainly not decisive of, the question of "merit". Given the difference in wording between the arts and education defenses the Court will obviously be highly skeptical of self-proclaimed "artistic merit", and, indeed of all claims to merit based on anything but the opinions of well-qualified critics. A new generation of expert witnesses on "artistic merit" will no doubt swarm like a flock of expensively dressed vultures from the imagination and cocktail connections of defense counsel to replace the aging avatars of "community standards". The "avant garde" is in jeopardy in dealing with these controversial subjects. Success will depend on the status and panache of their champions in the witness box. And those artist totally out of step with, or at odds with, the temper of the times will, to be frank, probably be convicted.

This does not address the profound question - what is "artistic merit" anyhow? As I read the popular cultural and artistic press nobody ever bothers anymore to debate "what is art?" - except

¹⁰ See R. v. Oakes [1986], 1 SCR 103.

tongue in cheek. In an age of deconstruction who knows the real meaning of anything? Perhaps I should put the point more directly in lawyers' language - the question of "artistic merit" is a dog's breakfast. It is not worth the ink to catalogue the various and serious claims advanced in the modern era to the moniker "Art". The debate will be endless, forensic philosophy at its finest, and funniest.

ii) Educational Purpose

And what is the substantive meaning of "educational, scientific or medical purpose"? If "artistic purpose" is the black hole of cultural philosophy, then "educational purpose" is an outer galaxy of social theory the distant edges of which ever recede before our eyes. If the pursuit of knowledge is an end in itself what are the limits of "educational purpose"? Who will be the expert witnesses? Professors? Politicians? Parents? Poets? What if the author proclaims a educational purpose the judge deems untenable?

We should ask: whose purpose? Will particular volumes from a collection of books on incest held in (a special adults only section of) a library be found to have an "educational purpose", while the same books for sale in a bookstore do not have this redeeming purpose? This ought not to be the result. The wording of the defense in Sec. 159.1(1) provides that if the "matter or communication in question has artistic merit or an educational, scientific or medical purpose" then the defense has been made out. It is not the possession of pornographic material that is criminal, but rather publishing and "dealing" in pornographic material. And we are not referred to the purposes of the dealer, but, again, to the purposes of the material. No doubt there will be many cases defended on the basis that whatever the allegedly sleazy purposes of the dealer, or the ultimate reader of the book may be, the book itself in other hands has legitimate "educational or scientific purposes", and is therefore saved.

Note the conundrum here for the academic establishment. They may wish to possess in libraries and research institutions a variety of materials that would be deemed to be pornographic if considered individually. Their possession would be obviously for "educational or scientific" purposes. However, the purpose of the possession does not provide a defense. Can the collection of material as a whole have a redeeming purpose? If so, what about the private pornography collection? What if the collection is bound in one volume? How fast can you dance?

I believe "educational purpose" will disappoint its draftsmen. They no doubt intended it to have objective meaning, and that the judiciary should defer to establishment educational authorities to determine a "proper" educational purpose. However, the reality is that the modern "educational" establishment has an

entirely catholic dominion. Respectable experts can no doubt be found to lay claim to the legitimate study of just about anything. There are important opportunities for the defense in these troubled waters.

iii) Charter Challenge

We have mentioned the Charter challenge pending on the limited scope of 159.1(1), defenses and the reverse onus. A more difficult question is what degree of artistic freedom and educational purpose the court may require as an inherent aspect of any constitutionally justifiable infringement of "freedom of expression". More specifically will the Charter require greater freedom than the wording of the defense in the proposed legislation.

The American case law on the nature of obscenity gives some sense of the boundary between the pornographic and acceptable artistic or educational material as viewed by the judiciary. "Obscenity" in the United States is beyond the protection of constitutional "free speech". In Miller v. California, 413 US 15 the American Supreme Court laid down this test:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs; that concept has never commanded the adherence of more than three Justices at one time.

We could fill many pages with an analysis of these words, but will not. The bad news is that the court incorporates a community standards test into the definition. The good news is that "patently offensive" suggests a higher degree of respect for free speech than "community standards of decency". The basic point is that there are good arguments that the very nature of freedom of expression requires at the least the widest berth for "artistic merit and educational purpose". Here is yet another substantial constitutional test case.

D) DEGRADING

The proposed law does not criminalize written material that "advocates" mere intercourse [see Section 138(a)(vi)], but written

material that advocates or incites a degrading act [see Section 138(a)(iv)] will be a crime. Section 138(a)(iv) declares pornographic the following:

- (a)(iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the person appears to be consenting to any such act, or lactation or menstruation in a sexual context.

The language covers everything from treating another as an "animal or object" in a "sexual context" to defecation and urination.

Given the difficulties of establishing a defense if the supposed advocacy involves one of the prohibited subject matters, and exemption from prosecution if the subject matter is ordinary intercourse, the boundary line between the two domains is obviously of critical importance.

When do we slip beyond intercourse (anal, oral or vaginal) which as it appears are per se not degrading to related sexual acts when treating another as "an object in a sexual context" is found to be degrading? Many common sexual preliminaries would be regarded as degrading by someone. Posing? Body rub? The government has no place in the bedrooms of the nation, but mind what you do on the way down the hall!

What a frail reed - degrading! A simple majoritarian approach to this meaning of this word - what do most people think is degrading - would take us right back to "community standards" of decency. Enough has been said already about the difficulties of objective definitions and the privileged role of the judiciary making them that we do not need to belabour the total inadequacy of this word to mark the dangerous border.

E) HATE PROPAGANDA

A comparison with the "hate propaganda" provisions of the Criminal Code is instructive. ¹¹ Here we find comparable offenses for "inciting and promoting". Bill C-54 proposes to add sex to the existing Criminal Code "hate propaganda" laws as one of the prohibited categories. To those who suggested the

¹¹ See Appendix II.

inclusion of pornography in the hate sections of the Code as opposed to special obscenity/pornography crimes, the government has responded by creating both crimes, not just one!

A close reading of Section 281 discloses the hierarchy of offense. To "advocate or promote genocide" is an indictable offense, punishable by 5 years. To "incite hatred in a public place" is an offense punishable by 2 years, and to "wilfully promote hatred" is an offense punishable by 2 years. There is a defense of truth, good faith and public interest to the latter two charges, but not the first.

Note that Section 138(b) goes even further than hate propaganda provision. It captures anything that incites, promotes, advocates or encourages not just hatred based on sex, but any of the sexual conduct regarded as pornographic in Sections 138(a) (i-v). It provides no defenses of truth, good faith or public interest. It is a crime whether or not the words are spoken "wilfully".

Thus writers will face the prospect of prosecution if their work is seen to "incite sex hatred in a public place" or "wilfully promote sex hatred" in private. Presumably books will be vulnerable under the latter. The degree of conscious intention as required by these words by R. v. Buzzanga was the subject of earlier comment. What is extremely worrisome is the open-ended nature of the meaning of "promoting hatred". Clearly this does not require any action by the reader as proof that hatred has in fact been generated. And what is "hatred"? Where do we start? Fortunately, we can report that there have been few prosecutions under Section 281 to date, so, unfortunately we have little by way of judicial guidance.

F) CONCLUSION

It is impossible to be precise in predicting the future interpretation of Bill C-54. But some more general observations can be made with certainty.

A purely subjective defense of artistic or education motives by the accused will continue to be largely inadmissible and irrelevant. It is unlikely our Court will strike out the legislation altogether on free speech grounds, but there are some promising lesser Charter arguments. The reverse onus placed on artists and educators will be challenged. The absence of an artistic defense regarding children in sex will be challenged and strong Charter arguments that some evidence of real impact or effect must be shown has a good chance of success, although it is unlikely the court will go too far down that road. Look for a careful judicial construction of what the average reader is

likely to do. It is predictable that a fierce battle will be waged for years over the meaning of "degrading" with no clear

victor. Similarly "educational purpose" will provide grist for the defense mills until we are but dust. The new law is progress only in the sense that for writers the list of forbidden subjects has been defined and narrowed slightly from the wider scope of "obscenity". But the definition of the new offense and defense are full of legal uncertainties.

How do you "promote", for example, bestiality? Which defense would you like, the false objectivity of "artistic merit", or the borrowed subjectivity of "educational purpose".

Where does all this lead us? Into a legal bog as deep and dark as the one which now - in the name of obscenity - fetters our speech and chills our thoughts and clouds our imagination.

The lawyers will be very busy.

APPENDIX I

Important Sections of Proposed Bill C-54

1. Section 138 of the Criminal Code is amended by adding thereto, in alphabetical order within the section, the following definitions:
"erotica" means any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region;
"pornography" means
 - (a) any visual matter that shows
 - (i) sexual conduct that is referred to in any of subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be, under the age of eighteen years, or the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years,
 - (ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,
 - (iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context,
 - (iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,
 - (v) bestiality, incest or necrophilia, or

- (vi) masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse, or
 - (b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v).
- 159. (1) Every person who deals in pornography is guilty of an offence.
- (2) For the purposes of this section, a person deals in pornography if the person imports, makes, prints, publishes, broadcasts, distributes, possesses for the purpose of distribution, sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, the pornography.
- (3) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.
- (4) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in any of subparagraphs (a)(iii) to (v) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in any of those subparagraphs, is guilty
 - (a) of an indictable offence and is liable to imprisonment for a term not exceeding five years; or
 - (b) of an offence punishable on summary conviction.
- (5) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(vi) of the definition "pornography" in section 138 is guilty
 - (a) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - (b) of an offence punishable on summary conviction.

- 159.1(1) Where an accused is charged with an offence under section 159, other than an offence that is in relation to conduct referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the matter or communication in question has artistic merit or an educational, scientific or medical purpose.
- (2) Where a court finds an accused not guilty by reason of the defence of artistic merit set out in subsection (1), the court shall declare that the matter or communication that formed the subject-matter of the alleged offence is not pornography.
- 159.7 Every person who displays any erotica in a way that is visible to a member of the public in a public place, unless the public must, in order to see the erotica, pass a prominent warning notice advising of the nature of the display therein or unless the erotica is hidden by a barrier or is covered by an opaque wrapper, is guilty of an offence punishable on summary conviction.
164. Every one who makes use of the mails for the purpose of transmitting or delivering any pornography or any hate propaganda referred to in sections 281.1 to 281.3 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or of an offence punishable on summary conviction.

APPENDIX II

HATE PROPAGANDA PROVISIONS OF THE CRIMINAL CODE

- 281.1(1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.
- (2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:
- (a) killing members of the group, or
 - (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
- (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
- (4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin. R.S.C. 1970, c.11 (1st Supp.), s.1.
- 281.2(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
- (a) an indictable offence and is liable to imprisonment for two years; or
 - (b) an offence punishable on summary conviction.
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
- (a) an indictable offence and is liable to imprisonment for two years; or
 - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

- (4) Where a person is convicted of an offence under section 281.1 or subsection 91) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.
- (5) Subsections 181(6) and (7) apply mutatis mutandis to section 281.1 or subsection (1) or (2) of this section.
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
- (7) In this section
 - "communicating" includes communicating by telephone, broadcasting or other audible or visible means;
 - "identifiable group" has the same meaning as it has in section 281.1;
 - "public place" includes any place to which the public have access as of right or by invitation, express or implied;
 - "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. R.S.C. 1970, c.11 (1st Supp.), s.1.

Your name
Your address
The date

The Honourable R. Hnatyshyn
Minister of Justice
House of Commons
Ottawa, Ontario
K1A 0H8

Dear Mr. Hnatyshyn:

I/We support Bill C-54 in principle and urge you to move it to committee stage, where its provisions can be openly discussed and debated, as soon as possible.

I/We also urge you to listen to women's groups and other groups concerned about violence against women who want to make the bill as effective as possible while safeguarding genuinely erotic works.

In particular, I/we urge you to remove subsection VI of the bill's extensive and otherwise good definition of pornography, since I/we do not believe that intercourse, masturbation and ejaculation are intrinsically pornographic activities. I/we also urge you to remove the "defence of ignorance" for distributors so that distributors of pornography will not be able to claim that they didn't know the material they were distributing was sexually violent.

The media is doing their best to misinform us about Bill C-54 but there are many people who support your efforts to regulate violent and very degrading pornography.

Sincerely,



book & periodical development council

December 10, 1987

The Honourable Ramon Hnatyshyn
Minister of Justice
Justice Building
Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Mr. Hnatyshyn:

I appreciate your reply of October 21, 1987 to the Book and Periodical Development Council's position on Bill C-54 dated July 10, 1987.

Before addressing particulars I would like to state, respectfully, that, generally speaking, you are attempting to reassure us with reasons which cannot be found in the legislation. For example, you suggest that defences would be available even when police are considering initiating proceedings. It is our interpretation that defences are not to be considered at the stage of seizure.

You are correct that we have studied the ramifications of the R. v. Video World Ltd. case. The wording of 138 (a) (vi) "pornography means (a) any visual matter that shows... (vi) masturbation or ejaculation not referred to in sub-paragraph (vi), or vaginal, anal or oral intercourse," however, does not state that only explicit or graphic sexual acts will be caught; there is every risk that the courts would adopt the same interpretation as put forward in Video World.

Your point of availability of defences for artistic merit or an educational, scientific or medical purpose - especially with reverse onus - does not reassure us. The controversy over the question of the artistic merit of, for example, Lady Chatterley's Lover is renowned; the opposing viewpoints illustrate the subjective nature of this defence. Further, these defences are not available for materials involving persons under 18 years of age.

We believe that criminalizing the sale or distribution of explicit or simulated materials depicting consensual sexual activity is an unjustifiable infringement of freedom of expression. Again, we have the situation of young people being allowed to marry at the age of sixteen but forbidden to see "any visual matter that shows... vaginal, anal or oral intercourse." Municipal by-laws already regulate the sale and distribution of sexually explicit material to minors and we think that the majority of Canadians has no interest in preventing adults from obtaining such material.

In conclusion, I would like to say that the member organizations of BPDC have done considerably more work in the analysis of Bill C-54 since our letter of July 10, 1987. We know understand more clearly the far reaching effects of the legislation, yet your letter does not answer even our preliminary objections. As we await a satisfactory reply, we are increasingly horrified as the broader implications of the legislation become apparent.

In light of this, we most emphatically repeat our request that the government withdraw Bill C-54.

Yours truly,

A handwritten signature in black ink that reads "Stephanie Hutcheson". The signature is written in a cursive, flowing style.

Stephanie Hutcheson
Chairperson

ILER, CAMPBELL & ASSOCIATES

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January 7, 1988

David McLaren, President
Toronto Branch Council
ACTRA Writers Guild
2239 Yonge Street
Toronto, Ontario
M4S 2B5

Dear David:

Re: Bill C-54

You have asked my opinion on the constitutionality of Section 159.1 of the Bill C-54, the so called reverse onus "pornography" amendments to the Criminal Code. As you know the act defines certain types of activities which are pornographic and Section 159.1 allows that if a defendant shows on the balance of probability that the material has an educational or scientific purpose or artistic merit then they shall not be convicted.

I have argued since the introduction of the legislation that this provision violates the Charter of Rights guarantees of "freedom of expression" and "presumption of innocence". I note that in his letter to you September 25, 1987, Justice Minister Hnatyshyn down plays the significance of this provision. On page 3 he says:

While it is true that it is the accused who must establish that the subject matter of the charge should benefit from one of these defenses, he or she must only do so once the prosecution has successfully proven, beyond a reasonable doubt, that he or she is dealing in pornography. This is a shift in the evidentiary burden only; the legal burden remains on the Crown at all times. The Supreme Court of Canada has held that a shift in the evidentiary burden does not violate the fundamental presumption of innocence where it is rationally open to the accused to disprove the Crown's prima facie case.

There is now extensive charter litigation on the question of presumption of innocence and those various sections of the Criminal Code which shift the burden of proof in one way or the other to the accused. The leading case in the this area is R. v. Oakes [1986] 1 SCR 103. In this case of Supreme Court of Canada struck down "reverse onus" provisions in the Narcotics Control Act which provided that an accused had the burden of proof on the balance probabilities that their possession of narcotics was not for the purpose of trafficking. The Supreme Court ruled that the proof required of an accused by this violated the presumption of innocence. According to the Charter of Rights a violation of rights can be justified if it is "reasonable limits prescribed by law demonstrably justified in a free and democratic society". The court has interpreted this to mean that there must be some proportionality between the wrong which is being addressed and the degree of infringement. With respect to this reverse onus provisions the court ruled that this required there was a "rational connection" between the fact of possession and the presumed purpose of trafficking. In the result the court struck down this provision in the Narcotic Control Act.

The same issue has been discussed in many cases where reverse onus provisions of one sort or another have been attacked. Many have survived the attack where the courts have ruled that there was a rational connection demonstrated. For example, the Criminal Code provisions that requires someone caught with burglar's tools to prove that they have a lawful excuse for the possession of same. This was held to have a "rational connection" to harm addressed by the Code, and the sections survived attack. [see R. v. Holmes 41OR (2d) 250 (OCA)].

A second line of cases discussing this issues focus on whether the legislation under attached shifts merely the evidentiary burden as opposed to the legal burden. This is summarised neatly as follows:

In Oakes, the court classified rebuttable presumptions favouring the Crown into three categories of rebuttable presumptions (s.241(1)(c) creates a rebuttable, as opposed to an irrebuttable, presumption). First, a permissive presumption may tactically require an accused merely to raise a reasonable doubt once the Crown establishes the proved fact giving rise to the presumed fact, failing which the trier of fact may infer the presumed fact. Second, a mandatory presumption legally requires an accused to raise reasonable doubt as to the presumed fact, failing which the

trier of fact must infer the presumed fact. Third, a mandatory presumption legally requires an accused to disprove the presumed fact on a balance of probabilities, failing which the trier of fact must infer the presumed fact. The Supreme Court characterized s.8 of the Narcotics Control Act as falling into the third category.

It is my opinion that s. 241(1)(c) of the Criminal Code falls into the second category of rebuttable presumptions. Once the Crown establishes the fact that a person has driven within two hours of taking a breathalyzer test, the trier of fact must, in the absence of evidence raising a reasonable doubt, find that the person's blood-alcohol reading was the same at the time of driving as at the time of testing. Once a presumption falls into the second category, the presumption prima facie contravenes s. 11(d) of the Charter with the result that the Crown must demonstrate its reasonableness with s.1 of the Charter: Re Boyle and The Queen (1983), 41 O.R. (2d) 713, 148 D.L.R. (3d) 449, 5 C.C.C. (3d) 193 (C.A.).

[see R. v. Hummel, 60 O.R. (2d) 545 at 550]

In my opinion the provisions of Section 159.1 are directly equivalent to the "reverse onus provisions" that were struck down in R. v. Oakes. There is a legal and evidently burden on the accused to prove on a balance of probability the redeeming qualities of the materials in question, whether artistic, scientific or educational. In this I am obviously in disagreement with those officials in the Department of Justice who are advising Mr. Hnatyshyn and whose opinions are reflected in his letter of September 25. It seems to me that these officials are trying to pretend that the 159.1 defense is superfluous to the crime of "possession" defined earlier in Sec. 159, within which the Crown has the normal burden of proof. In my opinion the Charter makes this approach impossible.

Our courts (and American courts under their Bill of Rights), have consistently ruled that artistic merit, educational and scientific purpose were implicit exceptions to any legislative attempt to ban sexual material.

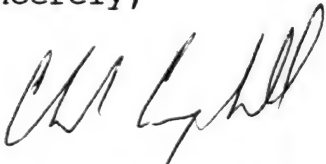
The constitutionally guaranteed principles of freedom of expression would not permit the banning of depictions of, for example, sexual intercourse per se, without some consideration of artistic, educational or scientific purpose or merit. Section 1 of the Charter and the cases under it are clear that where freedom of expression has been infringed the burden of proving the justification of that infringement lies on the government. Thus, the "reverse onus provisions" in Section 159.1 are at odds with Section 1 itself.

No all-encompassing ban on the depiction of sexual material is rationally connected to the legitimate social interest sought to be protected by the Criminal Code. While the courts may or may not go so far as to strike down the entire legislation I am confident that they will find there is no "rational connection" between sexual material per se and the legitimate social concerns, e.g. the prevention of violence, to be addressed by the criminal law.

In conclusion let me say that with the legislation as drafted there will be no avoiding the expensive constitutional battle that will follow on the passage of this legislation, in particular Section 159.1. The issues raised are central to the survival of "freedom of expression" in this country. Hopefully, someone in Ottawa will come to their senses.

I'm available to discuss these matters further as may be required.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Charles Campbell', with a stylized, cursive script.

Charles Campbell
CC:ck



book & periodical development council

May 6, 1988

Charles Campbell
Iler, Campbell & Associates
150 Simcoe Street
Toronto, Ontario
M5T 1Z9

Dear Charlie,

Just when we thought it might all go away, we have had a flurry of letters from the Honourable Ray Hnatyshyn, P.C., Q.C., M.P.

I enclose copies of these letters, and copies of ours to which he is responding.

I'm inclined to let the matter rest until such time as the Bill gets back on the order paper, if it ever does. I suspect that Hnatyshyn is mainly trying to counter the press reports that the government is no longer committed to this legislation and has put it on the back burner.

If you think we should make a further response, let me know, otherwise, just add the lot to your overflowing file cabinets!

Yours truly,

A handwritten signature in blue ink that reads 'Nancy'.

Nancy Fleming
Executive Director

Minister of Justice
and Attorney General of Canada



Ministre de la Justice
et Procureur général du Canada

The Honourable L'honorable
Ray Hnatyshyn, P.C., Q.C., M.P./C.P., C.R., Député

May 2, 1988

Ms. Stephanie Hutcheson
Chairperson
Book & Periodical Development Council
200 - 34 Ross Street
Toronto, Ontario
M5T 1Z9

RECEIVED MAY 05 1988

Dear Ms. Hutcheson:

Thank you for your letter of December 10, 1987 in which you draw to my attention additional concerns of the Book and Periodical Development Council regarding Bill C-54. I regret that I was unable to reply earlier.

In the way of a follow-up to my last letter, I would like to again emphasize that these proposals are directly aimed at hard-core pornography while preserving creative freedom and that it has never been my intention to impose censorship on what Canadians are allowed to see or read.

The definition of pornography that applies to visual matter is directly aimed at child and hard-core pornography. In my view, hard-core pornography includes not only material which is violent and sexually degrading but, as well, is characterized by the depiction of explicit sexual acts. It is important to note, however, that the proposed legislation refers to "any visual matter that shows" masturbation, ejaculation, vaginal, anal or oral intercourse. A restrictive interpretation of the word "shows" would require that it be read as visual matter showing, for example, actual as opposed to simulated intercourse. This interpretation would therefore permit these forms of simulated sexual activity to be represented visually thereby allowing the artist or the actor to express a variety of sexual themes. This interpretation would conform to the government's intent and would be preferred by the courts since, in any case of doubt, it would favour an accused.

This Bill is, in fact, more liberal than the present law in that it deals with text only in so far as the text, "incites, promotes, encourages or advocates" child sexual abuse, sexual violence, bestiality, incest, necrophilia or degrading sexual acts.

Books may, therefore, contain descriptions of any of the sexual activities referred to in the definition of pornography, and, as well, literature which incites, promotes or encourages masturbation, ejaculation, or vaginal, anal or oral intercourse would not fall within the definition of pornography.

With respect to the special defences available of artistic merit, educational, scientific or medical purpose, while it is true that it is the accused who must establish that the subject matter of the charge comes within the scope of one of these defences, he or she must only do so once the prosecution has successfully proven, beyond a reasonable doubt, that the accused is dealing in pornography. The accused benefits from the presumption of innocence as long as proof of the essential elements of the offence has not been established. The fact that a picture, film or book has or does not have artistic merit is not an element of the offence as defined by the proposed statute and, accordingly, the prosecution need not disprove artistic merit or any of the other special defences.

It will be the ultimate responsibility of the judiciary to define artistic merit and, in most cases, the court will be assisted by experts from the artistic community in making this determination. Secondly, in practice, the judge or jury will be left to adopt the opinion of the Crown or defence expert, and the definition will therefore derive from the artistic community itself.

Regarding section 160, the forfeiture provision, you are correct in your observation that in the course of the show cause proceedings the defence of artistic merit or educational, scientific or medical purpose is not available to the owner and maker of the "thing" before the court. Given that the implementation of the section does not result in a finding of criminal liability against an individual or a corporation by reason of forfeiture, it was felt that it was not necessary to extend the special defence to such proceedings. This issue which you have raised, however, will be open to further consideration during the House of Commons Legislative Committee proceedings which will be held after the Bill receives Second Reading.

I believe that Bill C-54 provides improved protection for all Canadians, particularly our young people, against the spread of pornography in society. In doing so, it strikes an appropriate balance between the need to curtail the distribution of exploitive material on the one hand and freedom of expression on the other.

I am, however, looking forward to an extensive examination of each of the Bill's clauses in legislative committee and, as I have assured Members of Parliament, I will be listening with great interest to any constructive suggestions with regard to the Bill.

With kindest regards, I remain,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ray Hnatyshyn'. The signature is fluid and cursive, with the first name 'Ray' written in a larger, more prominent script than the last name 'Hnatyshyn'.

Ray Hnatyshyn

Minister of Justice
and Attorney General of Canada



The Honourable L'honorable
Ray Hnatyshyn, P.C., Q.C., M.P./C.P., C.R., Député

RECEIVED APR 20 1988

Ministre de la Justice
et Procureur général du Canada

C. Campbell

April 15, 1988

Ms. Stephanie Hutcheson
Chairperson
Book & Periodical
Development Council
200 - 34 Ross Street
Toronto, Ontario
M5T 1Z9

Dear Ms. Hutcheson:

Further to our exchange of correspondence, I wish to address the concerns regarding Bill C-54, which you expressed in your letter of October 15, 1987, to Members of Parliament, copy of which I have received from the Honourable Michel Côté. I regret that I was unable to reply earlier.

The current law controlling pornography has been criticized as being vague, subjective and incapable of equal application across Canada. The Special Committee on Pornography and Prostitution (the Fraser Committee) in its examination of these issues found that the present law and penalties were inadequate.

Bill C-54, "An Act to amend the Criminal Code and other Acts in consequence thereof", which I introduced in the House of Commons on May 4, 1987, addresses these inadequacies by providing a clearly articulated definition of pornography and makes a further provision for increased penalties, up to a maximum of ten years imprisonment, for the offence of dealing in child pornography. A person convicted of an offence in relation to this same subject matter under the current law on obscenity in Canada would only be liable to a term of imprisonment of two years.

I understand that you are concerned over some of the legislative proposals contained in Bill C-54 but I would like to assure you that they are necessary to protect the dignity

.../2

of the individual in Canadian society. It is also important to note that those proposals are directly aimed at hard-core pornography while preserving creative freedom. I would nonetheless like to comment on some of the issues that you raised in your letter.

In my view, Bill C-54 allows a broad scope for the expression of human sexuality in literature and the arts.

With respect to literature, books may contain descriptions of any of the sexual activities referred to in the definition of pornography and, as well, literature which incites, promotes or encourages masturbation, ejaculation, or vaginal, anal or oral intercourse would not fall within the definition of pornography. Furthermore, literature which incites, promotes, encourages, or advocates sexually violent conduct, degrading acts in a sexual context, and bestiality, incest or necrophilia is not pornographic if artistic merit, or an educational, scientific or medical purpose is evident.

The definition of pornography that applies to visual matter is directly aimed at child and hard-core pornography. In my view, hard-core pornography includes not only material which is violent and sexually degrading, but as well is characterized by the depiction of explicit sexual acts. It is important to note, however, that the proposed legislation refers to "any visual matter that shows" masturbation, ejaculation, vaginal, anal or oral intercourse. A restrictive interpretation of the word "shows" would require that it be read as visual matter showing, for example, actual as opposed to simulated intercourse. This interpretation would therefore permit these forms of simulated sexual activity to be represented visually, thereby allowing the artist or the actor to express a variety of sexual themes. This interpretation would conform to the government's intent and would be preferred by the courts since, in any case of doubt, it would favour an accused.

To further enhance the protection afforded to artistic and literary endeavours under Bill C-54, the proposals provide for a defence of artistic merit, and educational, scientific or medical purpose. These special defences apply to visual representation and the defence of artistic merit applies to theatrical performances. The defences are not available to those persons charged with dealing in pornography involving children or pornography that shows physical harm because it was felt that the social harm associated with these types of

conduct would not be protected by freedom of expression. Notwithstanding the availability of these defences, arts and literary organizations have expressed the fear that many artistic undertakings or displays would become initially suspect under Bill C-54 and, as a consequence, the artistic community would be subject to a flood of prosecutions. In response to this issue, I would like to point out that the detection of pornographic materials and the determination of the use to which such materials are put is placed in the hands of responsible persons who would be aware of the special defences available and cognizant of the guarantee of free expression, including artistic expression, contained in the Canadian Charter of Rights and Freedoms.

As well, the more precise definition given to pornography and the inclusion of the special defences which are expressly set out in this proposed legislation will decrease the opportunity for an arbitrary exercise of discretion on the part of prosecutors and law enforcement officers.

Bill C-54 further provides a definition of erotica and sets out a scheme by which the display of erotica is regulated and its sale or rental to a person under eighteen years of age is prohibited. Erotica, for the purposes of the proposed legislation, refers only to visual matter, a dominant characteristic of which is the depiction of a human sexual organ, a female breast or the human anal region. It is important to note that these depictions must be presented in a sexual context or for the purpose of the sexual stimulation of the viewer.

The legislation would only require that if a visual depiction of erotica is made visible to a member of the public in a public place, which would include a library, museum or art gallery, the public must in order to see the erotica pass a prominent warning sign advising of the nature of the display or, in the alternative, the erotica must be hidden behind a barrier or be covered by an opaque wrapper. The public in this case would include persons of all ages. If the erotica has artistic merit, or an educational, scientific or medical purpose, then there is no need for it to be obscured. With respect to pornography which has artistic merit, the proposed legislation does not specify requirements regarding its display.

Dealing with the defence provisions of artistic merit, educational, scientific or medical purpose, while it is true that it is the accused who must establish that the subject matter of the charge comes within the scope of one of these

defences, he or she must only do so once the prosecution has successfully proven, beyond a reasonable doubt, that the accused is dealing in pornography. The accused benefits from the presumption of innocence as long as proof of the essential elements of the offence has not been established. The fact that a picture, film or book has or does not have artistic merit is not an element of the offence as defined by the proposed statute and, accordingly, the prosecution need not disprove artistic merit or any of the other special defences.

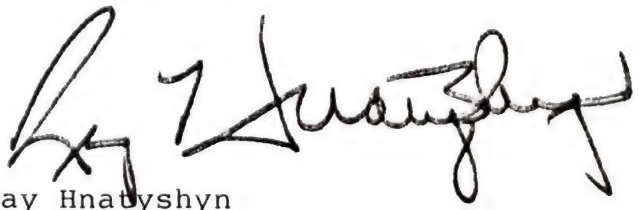
I do not believe that this new law would place hardship on the Canadian artistic community. It will be the ultimate responsibility of the judiciary to define artistic merit and, in most cases, the court will be assisted by experts from the artistic community in making this determination. In practice, the judge or jury will be left to adopt the opinion of the Crown or defence expert, and the definition will therefore derive from the artistic community itself.

In closing, I would like to reiterate that I do believe that artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. For that reason, I considered it essential to provide for the special defences in order to protect the freedom of speech and expression which are clearly entrenched in the Canadian Charter of Rights and Freedoms.

I therefore believe that Bill C-54 strikes an appropriate balance between the need to curtail the distribution of exploitive material, on the one hand, and freedom of expression, on the other, and I do remain committed to taking effective action in this area.

With kindest regards, I remain,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ray Hnatyshyn', with a stylized, cursive script.

Ray Hnatyshyn



book & periodical development council

October 15, 1987

Dear Member of Parliament,

The Book and Periodical Development Council has as a major part of its mandate to encourage the dissemination of information and ideas via the printed word. Our membership list is appended for your information.

We are concerned that Bill C-54, introduced in the House by the Honourable Ramon Hnatyshyn in May of this year, poses a severe threat to freedom of expression in Canada.

Among our many concerns with this proposed legislation are the following:

Section 138: The definition of "erotica" contained in the Bill is too narrow; among other representations, it excludes the act of love between two consenting adults, making it illegal to depict acts that are in themselves legal.

Section 138 (b): The reference to "any matter" clearly includes the printed word. Will a novelist portraying a character who advocates any of the proscribed conduct be liable under this section?

Section 159.1: In this section the proof rests with the accused to show that a work has artistic or educational merit. This reverse onus is contrary to the tradition of Canadian jurisprudence. This places an unfair burden on creators of literary and artistic works and can lead to self-censorship whereby expression is limited indirectly by fear of unknown, and unknowable, consequences.

A more detailed brief, setting out our concerns, is available from the Book and Periodical Development Council on request.

Please join us in urging the Prime Minister and the Minister of Justice to withdraw this bill in its entirety.

Yours truly


Stephanie Hutcheson
Chairperson

34 Ross Street, Suite 200, Toronto, Ontario M5T 1Z9 (416) 595-9967

MEMO

TO: Charles Campbell
FROM: peter bartlett
RE: BPDC: NAC resolution
DATE: 28 October 1987

The following is the text of the resolution passed by the National Action Committee on the Status of Women at its annual meeting in Halifax this year:

BE IT RESOLVED THAT NAC reject the proposed legislation on pornography;

BE IT FURTHER RESOLVED THAT NAC lobby the government to ensure that any legislation,

- a) focus on violence rather than on sexual acts;
- b) not affect distribution of sexual education materials to people under the age of eighteen;
- c) not re-inforce heterosexism: discrimination against lesbians and gays;
- d) NAC lobby government to ensure that any legislation put the onus on the crown to prove any material charged under the legislation does not have educational or artistic merit, rather than on the artist or educator to prove that it does.

